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BY
SIMEON E. BALDWIN, LL.D.



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PART I

THE NATURE AND SCOPE OF THE JUDICIAL POWER IN THE UNITED STATES

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THE AMERICAN JUDICIARY

CHAPTER I —

ENGLISH ORIGIN AND EARLY DEVELOPMENT OF THE AMERICAN JUDICIARY

No government can live and flourish without having as part of its system of administration of civil affairs some permanent human force, invested with acknowledged and supreme authority, and always in a position to exercise it promptly and efficiently, in case of need, on any proper call. It must be permanent in its character. Only what is permanent will have the confidence of the people. It must always be ready to act on the instant. The unexpected is continually happening, and it is emergencies that put governments to the test.

The judiciary holds this position in the United States. The institutions which underlie and characterize it, both of the United States and of each of the States, considered by itself,¹ are the outgrowth of those of the thirteen English colonies on the Atlantic coast, which declared their independence in 1776.

The colonial charters, whether of the proprietary,

¹ I do not except Louisiana, for trial by jury and other institutions derived from the common law have profoundly affected her whole judicial system.

provincial or republican type, were all equally charters for Englishmen, based on the common law of the English people. So far as they granted legislative power, it was generally declared that it should be exercised in conformity, so far as might be practicable, with the laws of England. The proviso to this effect in the roving patent given by Queen Elizabeth to Sir Walter Raleigh may be taken as a type: "so always as the said statutes, lawes, and ordinances may be, as neere as conveniently may be, agreeable to the forme of the lawes, statutes, government, or pollicie of England."¹

In the Southern New England colonies, when first settled, the common law of England was disowned. They made the little law which they needed for themselves, and as cases which this might not provide for arose, they were to be decided by such rules as the magistrates might think right and warranted by the precepts found in the Bible. Connecticut continued to insist on this view, with general consistency, until the days of the Stamp Act, when it became the interest of her people to claim the benefit of the principles of the English constitution and of the common law, on which it was built up.²

In early Massachusetts the written pleadings often referred to the Bible, quoting a text from it as an authority, just as citations now might be made in a

¹ Poore, "Charters and Constitutions," II, 1381.

² Colonial Records of Conn., 1689-1706, 261; Conn. Stat., ed. of 1769, 1. Cf. citations by D. Davenport, *arguendo*, in Flynn v. Morgan, 55 Connecticut Reports, 132-134, from MSS. in the State archives.

ENGLISH ORIGIN AND EARLY DEVELOPMENT

lawyer's brief from a legal treatise or reported case.¹

As was anticipated in the Raleigh patent, it was found from the first and everywhere that if the common law was to be applied to the rough conditions of colonial life some modifications were necessary. These the colonists were, in the main, left free to make at their pleasure. Much of this work came to be done by their legislative assemblies; more by their courts. The assemblies sat but for a few days in the year: the courts were always open to suitors, and sessions of the inferior ones were frequent.

The assemblies, however, were themselves courts. At first they kept in their own hands a large share of judicial power. They acted as the early parliaments of England had acted, both as a legislature and a judicial tribunal. In several colonies they long kept to themselves the right of deciding private controversies on equitable principles. They sat as a court of review, to grant new trials or review judgments. They passed acts of attainder. They settled insolvent estates.²

This mingling of judicial with legislative functions is a thing to be tolerated only while the foundations of a government are being laid. As the Roman plebeian, in the days before the Twelve Tables, clamored for a known and certain law, so the common people of the early colonies insisted that from a similar want they held their rights too much at the will of their rulers.

¹ Publications of the Colonial Society of Mass., III, 324.

² Wheeler's Appeal, 45 Connecticut Reports, 306, 314.

THE AMERICAN JUDICIARY

In the colony of New Haven a code was early framed; but there they built on a written law—the Bible.¹ In Massachusetts, where they were more anxious to avoid conflict with the common law, the problem was a serious one.

Winthrop, writing in 1639, describes it with his usual clearness and discrimination thus:

The people had long desired a body of laws, and thought their condition very unsafe while so much power rested in the discretion of magistrates. . . . Two great reasons there were, which caused most of the magistrates and some of the elders not to be very forward in this matter. One was want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive that such laws would be fittest for us which should arise *pro re natâ* upon occasions, etc., and so the laws of England and other states grew, and therefore the fundamental laws of England are called customs, consuetudines. 2. For that it would professedly transgress the limits of our charter, which provide we shall make no laws repugnant to the laws of England, and that we were assured we must do. But to raise up laws by practice and custom had been no transgression.²

The tendency toward partial codification proved too strong to be resisted, and all the colonies soon had a substantial body of written law published in official form.

The exercise of judicial power by colonial legislatures was steadily contracting throughout the century preceding the Revolution. Where there were Governors appointed by the crown, they discouraged

¹ New Haven Colony Records, I, 12, 115, 116; II, 569, 570.

² Winthrop, "History of New England," I, 322.

it. The courts were correspondingly strengthened. Law became better understood and more wisely applied. A large body of local statute law had grown up by 1750, much of it already venerable by antiquity, and intimately interwoven with the life of the people. Its form and color differed in different colonies. Religious views and preferences had had a large effect in shaping it. So had influences proceeding from the civil war, the Commonwealth, and the Restoration. Yet at bottom there was the same substructure in Virginia as in Massachusetts, in Pennsylvania as in New York. It was the common law of England as it existed in the days of the last of the Tudor and first of the Stuart reigns.

This had been built into the foundations of American institutions and kept firm in place, not only because the colonists were habituated to it¹ and themselves both English subjects and the descendants of Englishmen of those days, but largely by force of the British system of colonial government through the Lords of Trade and Plantations. The ancient *aula regis*, in which the king dispensed justice at first hand, had survived in another form in the tribunal known as the King in Council. This, so far as the colonies were concerned, was represented by a standing committee of the Privy Council. It was substantially the same thing as the Court of Star Chamber, but since 1640 without the extraordinary penal jurisdiction which gave that so evil a reputation for Americans.² This committee was after this restriction of its

¹ *Fitch v. Brainerd*, 2 Day's (Conn.) Reports, 163, 189.

² Maitland, "Justice and Police," 5.

powers known as the Lords of Trade and Plantations,¹ and by its authority from the time when England first had colonies of any commercial importance (and those in America were the first) their statutes could be set aside and the judgments of their courts, when of any considerable magnitude and importance, reversed.² This revisory jurisdiction, though questioned and occasionally evaded or thwarted by the colonial governments, became solidly established long before the Revolution.³ In but one case did a colonial court formally ignore a judgment of reversal. This was in 1738, when the Superior Court of Judicature of Massachusetts, at its sittings in York County, in what is now the State of Maine, disobeyed an order of the King in Council made on appeal from one of its judgments, and when it was repeated a year later, adhered to its original position.⁴ The amount involved was trifling, and the Lords of Trade and Plantations made no further effort to enforce their order.

The natural effect of this court of appeal at London was to keep the public proceedings of the colonies in line with the common law of England, so far as related to its fundamental principles.

A certain uniformity of result was thus secured. American law, in its substantial framework, was not

¹ It was afterward and is now called the Judicial Committee of the Privy Council.

² See Paper on Appeals to the Lords of Trade from Colonial Courts, by Harold D. Hazeltine, Report of the American Historical Association for 1894, 299.

³ "Two Centuries' Growth of American Law," 12, 18, 264.

⁴ *Frost v. Leighton*, Publications of the Colonial Society of Massachusetts, III, 246.

allowed to vary from English law in any case where agreement was reasonably practicable. There was a central power at London ever ready to enforce the charter rule. The colonial courts, if their judgments were to stand, must proceed in conformity to the British constitution. Justice must be administered by due course of law, and to find out what that due course was the judges were forced to study the English law-books. When Blackstone's Commentaries were first published, more copies were sold in America than in England.¹

The colonial bench was weaker than the colonial bar. Judicial station was at first always, and later often, a mere incident of political office. When judges were appointed whose functions were wholly judicial, their selection was largely dictated by political considerations or executive favor. Few of them were really learned in the law. Of the bar many were. That of Massachusetts did not conceal its disapprobation when Lieutenant-Governor Hutchinson, although he had never been a member of it, was appointed Chief Justice in 1760. None of the judges of the first Superior Court in that colony were lawyers.² In some of the others the Governor was the Chancellor, and in Maryland he was at one time the Chief Justice also.³ In several the judges were appointed during the

¹ "Two Centuries' Growth of American Law," 20.

² Winsor, "Narrative and Critical History of America," V, 166.

³ Steiner, "Maryland's First Courts," Reports of American Historical Association for 1901, 211; Osgood, "The American Colonies in the Seventeenth Century," I, Chap. II; II, Chap. XII.

king's pleasure, and the Governor removed them at his discretion, without any notice or hearing.¹

In those colonies which were provided by charter with a Court of Assistants, this body soon came to act as a judicial court. This took place in the colony of Massachusetts Bay as soon as the seat of the company's government was transferred from England to America, and took place as a matter of course. Divisional courts were frequently held by part of the assistants, with original jurisdiction of minor causes, and all sat semi-annually, or oftener, to try larger ones and hear appeals.²

In Connecticut, appellate jurisdiction was originally retained by the General Assembly, but when the docket became too crowded, resort was occasionally had to the appointment of a special and temporary commission of appeals to clear it off. As early as 1719, one was constituted for this purpose to hold office for two years.

No colony set up a permanent supreme court with full appellate jurisdiction. None probably cared to do this, and none probably thought that it could. The Lords of Trade and Plantations would have rightly thought such a step hardly consistent with the main-

¹ Bancroft, "History of the United States," II, 279. A notable instance of a removal in consequence in part, at least, of a decision as to the royal prerogative, not relished by the Governor, was the case of Chief Justice Lewis Morris of New York, in 1733. Documents relating to the Colonial History of New York, V, 948; VI, 4, 8, 951.

² Noble, "Records of the Court of Assistants of Massachusetts Bay," I, Preface; Publications of the Colonial Society of Massachusetts, III, 317.

tenance of their revisory and controlling powers. It would have been too costly to allow two appeals; and for them to reverse a judgment of a colonial supreme court would have been more distasteful to Americans than the exercise of a similar power as to a court professedly of superior, not supreme, jurisdiction.

New York had a court named Supreme, but its business was largely the trial of original causes, and the Governor and Council claimed the right of reviewing its judgments. The judges in 1765 denied the existence of such a right, but the King in Council decided against them.¹

As soon as regular judges, not members of other departments of the government, were appointed for the highest court, they were generally required to perform circuit duty in the various counties during part of each year.² This was a leading feature of the judicial establishment set up in 1686 under Sir Edmund Andros for the "Dominion of New England."³

South Carolina, for a hundred years, centered all her judicial business at Charleston. No courts sat anywhere else and all the lawyers in the State resided in the city. In the latter part of the eighteenth century she followed the other colonies in establishing a circuit system and county courts.⁴

¹ Hunt, "Life of Edward Livingston," 26.

² See "Am. Hist. Review," III, 44.

³ Col. Rec. of Conn., III, 402, 411.

⁴ Morse, "American Universal Geography," ed. 1796, 690; Osgood, "The American Colonies in the Seventeenth Century," II, 279, 300.

There was occasionally some little approach to English form when the colonial judges went on the circuit. In Massachusetts the sheriff or his deputy was accustomed to come out from the court town to meet the judges as they approached it, to open a term of court.¹

Acts of Parliament directly affecting procedure in American courts, and unifying its methods in some particulars, were occasionally passed during the colonial era. Such was the Act of 1732 (V, Geo. II, Chap. VII), making affidavits taken in England admissible in any suit in an American colony to which an Englishman might be a party, and providing that all American real estate (including negro slaves employed upon it) should be subject to be levied on for any debts of the owner, although real estate in England could only be taken for debts of a particular kind.² Other English statutes, passed after the settlement of the colonies, and not in terms applying to them, were often adopted here, either by the enactment of colonial statutes to the same effect or by incorporation into our common law by tacit consent, as interpreted by the courts.³

The benefit of the writ of *habeas corpus*, which, though issuable at common law, really first took its

¹ "Life and Works of John Adams," II, 280. See Chap. XIII.

² Connecticut promptly passed a statute extending the new remedy thus given, so as to authorize the sale of land belonging to the estate of a deceased person, to pay his debts, if he did not leave sufficient personal estate for that purpose. Col. Rec. of Conn., VII, 444.

³ *State v. Ward*, 43 Connecticut Reports, 489, 494.

present shape in 1679, by the Act of 31 Charles II, Chap. II, was thought in this country, though not by the Lords of Trade and Plantations, to be a privilege of Americans, as British subjects. In some colonies this statute was re-enacted, or, as in Virginia, rights under it conceded under the royal prerogative. In others, as in Maryland, it was treated as being, by tacit adoption, the birthright of the inhabitants. In the "Declaration and Resolves" of the first Continental Congress, they assert "that the respective colonies are entitled to the Common Law of England," and in the address to the people of Great Britain they complain that the English settlers in Canada "are now the subjects of an arbitrary Government, deprived of Trial by Jury, and when imprisoned cannot claim the Benefit of the *Habeas Corpus* Act, that great Bulwark and Palladium of English Liberty."¹

The same sentiments dictated the terms of the Ordinance of 1787, under which our first Territories were to be organized. One of its leading provisions was this:

ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law.

A recognized system of jurisprudence had, under the circumstances and from the causes which had been stated, begun to grow up before the Revolution. It

¹ Journals of Congress, I, 29, 44. A. H. Carpenter, "Habeas Corpus in the Colonies," *American Historical Review*, VIII, 18.

might fairly be called American, but it was thoroughly English by heredity, and had been shaped by a long succession of English influences, and steadied by the firm hand of English power.

The Revolutionary War made everything connected with the law of England distasteful to the people at large. The lawyers knew its value: the community did not. Public sentiment favored an American law for America. It was quickened by the unfriendly feeling toward the mother country which became pronounced toward the close of the eighteenth century and culminated in the War of 1812. Several of the States, New Jersey leading off, passed statutes forbidding the citation, in the argument of causes, of any decisions of the English courts made since the Declaration of Independence. Under one of these Henry Clay, in 1808, was stopped by the Supreme Court of Kentucky when reading in argument from an opinion of Lord Ellenborough;¹ but after a few years, legislation of this kind, while it might remain formally unrepealed, was treated as obsolete both by court and bar.²

In courts held by unlearned judges, also, English law-books were lightly considered. One of this kind was Chief Justice Livermore, of New Hampshire. Shortly after the close of the Revolution, while presiding on the bench, he stopped a lawyer who was reading from one with the inquiry whether he thought

¹ *Hickman v. Boffman*, Hardin's Rep., 348, 364.

² Statutes of New Jersey, ed. of 1800, p. 436 (1799); Morehead and Brown, "Digest of the Statutes of Kentucky," I, 613 (1807).

that the members of the court did not "understand the principles of justice as well as the old wigged lawyers of the dark ages did."¹

But whether cited or not from their original sources, the settled doctrines of English law were sure in the end to permeate both bar and bench in every State.

The Roman law and the law of nations were studied in preparation for admission to the American bar more generally and more thoroughly in the years immediately preceding and following the Revolutionary era than they have been since.² The law student was also set then to reading more books on English law than he is now.³ He learned his profession by the eye and not by the ear. His only lectures were the occasional arguments on a demurrer or writ of error which he might hear in the court room, and these were a reiteration of rules laid down in English law-books.

The reason why he read more of Roman law than is now required in legal education was mainly that there was more time for it, since of English law reports there were then few, and of American none.

[When the Revolution broke out it also became important in helping to explain the practice in prize courts. These were set up (or existing common law courts invested with admiralty jurisdiction) in all the States, and American privateers gave them not a little business. In order to secure uniformity of decision in matters so directly affecting our foreign relations,

¹ "Memoir of Jeremiah Mason Mason," 29.

² See Chap. XXIII.

³ See Report of the American Bar Association for 1903, p. 675.

the Continental Congress claimed the right to exercise appellate functions, through a standing committee of its members, and in 1780 organized a formal court for the purpose, styled "The Court of Appeals in Cases of Capture." Three judges were appointed and provided with a register and seal. They held terms at Hartford, New York, Philadelphia and Richmond during the next six years. On an average about ten cases were disposed of annually, and the decisions were generally conceded to have been fair and well supported by the rules of admiralty and the law of nations.¹

The influence of French ideas was strong in shaping constructive work in American politics, as the colonies passed into States; but aside from the separation of the judicial department from the executive and legislative it had little effect upon the courts until the opening of the nineteenth century. Then the principles of the Roman law, particularly as presented and illustrated by the French jurists, were seized upon by Kent and Story, and served greatly to expand and enrich our jurisprudence.²

The course of events which has been sketched left certain ideas in regard to the position and powers of the judiciary with respect to the other branches of the government firmly imbedded in the American mind. These may be thus summarized:

¹ See Jameson, "Essays on the Constitutional History of the United States," 1; J. C. Bancroft Davis, "Federal Courts Prior to the Adoption of the Constitution," 131 United States Reports, Appendix, XIX.

² "Memoirs and Letters of James Kent," 117.

Judges were to proceed according to established rules, so far as established rules might exist.

They were to proceed in analogy to established rules as to points which no established rule might cover.

They were to look to the common law and political institutions of England to determine what rules were established, as to points not covered by local usage or legislation.

Local usage or legislation might, within certain limits, depart from the common law and even from the political institutions of England.

There were limits to such departure, and a colonial statute or judgment which transgressed them could be annulled or set aside by a higher authority.

This higher authority might be judicial or political, or one which shared both judicial and political functions.

CHAPTER II

THE SEPARATION OF THE JUDICIAL POWER FROM THE LEGISLATIVE AND EXECUTIVE IN AMERICAN CONSTITUTIONS

FROM the colonial system of legislatures by which all the powers of government were at times exercised to the modern American State, with its professed division of them into three parts, and assignment of each to a distinct department, was a long step.

So far as the United States were concerned, the weakness of the government under the Articles of Confederation had been universally acknowledged and was generally thought to come in part from throwing whatever powers the States had granted, in a mass, into the hands of the Continental Congress. Nevertheless, the Constitution of the United States is not framed upon the principles of a strict tripartite division. It places the executive power in the hands of the President, all the legislative powers which were granted by it in Congress, and the judicial power in certain courts; but it does not follow the earlier State Constitutions in declaring that whatever was vested in either of these three depositaries was and must always be different in kind from that vested in any other of them.

On this point Virginia set the fashion, but the

sonorous phrase of the Massachusetts Constitution of 1780 is the most familiar, in its declaration (Part the First, Art. XXX) that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."¹

It was from an unwillingness to commit themselves to such a principle that the people of Connecticut and Rhode Island preferred for many years to be governed in the old way by their legislatures, without a written constitution. During this period, the General Assembly of Connecticut repeatedly exercised the power of setting aside judgments of courts, and its right to do so was sustained by the Supreme Court of the United States.²

The courts of the United States were called upon at an early day to determine how far Congress could invest them with functions that were not judicial or not to be performed in a judicial manner. An act was passed requiring the Circuit Courts to pass upon claims for invalid pensions, their decisions to be subject to review by Congress. The performance of this duty was declined, and the attempt to put a judg-

¹ The last declaration of purpose was taken from Harrington's *Oceana*, in which it is said that while a monarchy is an empire of men, "a commonwealth is an empire of laws and not of men." Works, London ed., 35, 42, 224.

² *Calder v. Bull*, 2 Root's Reports, 350; 3 Dallas' Reports, 386.

ment of a court under the control of the legislature made the refusal so plainly proper that the act was repealed at the next session.¹

It was easier for the United States to maintain from the first this general scheme for the division of power than for the early States. Their people had grown up under too different a plan of government. It had become so familiar to them that they could hardly believe that it had been abolished. Tradition for them interpreted their new Constitutions and overmastered them. The State legislatures therefore continued for a time to claim some control over the judiciary, or at least a right to criticise and censure its doings.²

In many of our State Constitutions, after providing for a distribution of powers between three separate departments, instead of absolutely prohibiting any of them from exercising any power properly belonging to either of the others, it is declared that this shall not be done, except as may be expressly allowed in subsequent articles.

Such a declaration was proposed in the draft of the Constitution of Connecticut, reported to the convention which framed it in 1818; but on objection it was struck out.³ It was thought better to leave the relations of the departments to each other to be worked out in practice, and for nearly eighty years afterward the legislature continued to exercise some

¹ Hayburn's Case, 2 Dallas' Reports, 409.

² See Chap. VII.

³ Journal of the Constitutional Convention of Connecticut, pp. 78, 55.

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judicial power. It sometimes gave equitable relief to carry out a charitable purpose in a will, which would otherwise fail. It interfered repeatedly in probate proceedings. It released sureties in judicial recognizances. It set aside judgments.¹ A decision of the Supreme Court of Errors sanctioned the practice;² but in 1898 the court overruled its former opinion, and held that as the three departments were made separate and distinct, it needed no express constitutional declaration to prevent either from invading the province of the other, and so that no power not judicial in its nature could be conferred upon the courts.³

But may not a power be judicial in its nature and yet not wholly so?

It is practically impossible to establish in every instance a plain line of demarcation between legislative, executive and judicial functions.

Courts, for instance, make rules of practice. In one sense this is a judicial act, because it is one appropriate for the judiciary. In another point of view it is an act of legislation. In nothing does it resemble the act of judging a litigated cause.

Impeachments are both political and judicial proceedings, but American constitutions leave them wholly to the legislative department.

Franchises to exist as an artificial person are the

¹ Wheeler's Appeal, 45 Connecticut Reports, 306, 315; Stanley v. Colt, 5 Wallace's Reports, 119.

² Starr v. Pease, 8 Conn. Reports, 541, 547.

³ Norwalk Street Railway Company's Appeal, 69 Conn. Reports, 576; 37 Atlantic Reporter, 1080.

proper subjects of legislative grant, but with the growing insistence in our Constitutions on absolute equality of right, they are now almost everywhere given only by general laws. Such a law will offer incorporation for certain purposes to any who choose to avail themselves of the privilege by fulfilling certain conditions and filing certain papers in a public office. But what shall be the nature of this office, and who shall decide whether these conditions have been fulfilled and these papers filed? The legislature may select an executive, a legislative, or a judicial office. It may entrust this power of decision to an executive, a legislative, or a judicial officer. It has, in fact, in some States, entrusted it to a court, and authorized it, if it decided in favor of those claiming incorporation, not only to record the decision, but to issue the paper which shows that they are entitled to possess and enjoy the franchise. 7

It is safe to assert that in no State are the functions of the courts purely judicial. Many belonging to the administration of the methods of political government are in all intrusted to judicial officers either originally or by way of review. Some of these concern such matters of internal police, as the enforcement of laws to preserve the public health or to regulate the sale of intoxicating liquors, and the establishment and repair of highways.¹ Instead of creating a

¹ Application of Cooper, 22 New York Reports, 67, 82, 84; Norwalk Street Railway Company's Appeal, 69 Conn. Reports, 576; 37 Atlantic Reporter, 1080; Bradley v. New Haven, 73 Connecticut Reports, 646; 48 Atlantic Reporter, 960; Upshur County v. Rich, 135 U. S. Reports, 467, 477; Janvrin v. Revere Water Co., 174 Mass. Rep. 514; 55 North Eastern Rep. 381.

system of bureaus and prefects, we have adhered to the English plan of administering local and county concerns through justices of the peace, courts of quarter-sessions, and county or parish courts.¹ Of the affairs committed to such authorities some pertain to the conduct of elections, and courts are frequently empowered to appoint election officers or clerks, because it is felt that thus a wise impartiality in selection can best be attained.²

It is vital to the proper working of government under a written constitution that these constitutional restrictions on the powers of the courts should not be too strictly interpreted. Every step in the progress of civilization makes this the more obvious. No absolute trinity of governmental form can be maintained in human society, as the relations of each individual to his fellows, and of the State to all, become, and necessarily become, more numerous and complicated. In every State that department which in practice proves the strongest will push its jurisdiction furthest.

It may be said, in view of its now established power to decide between higher and lower forms of law,³ that the judiciary has proved the strongest. The legislature, as has been stated, have found it a convenient depositary of many quasi-legislative and quasi-executive functions, and this also has largely increased its power.

¹ See Maitland, "Justice and Police," 85.

² *People v. Hoffman*, 116 Illinois Reports, 587; 5 Northeastern Reporter, 596; 56 American Reports, 793; *Ex parte Siebold*, 100 U. S. Reports, 371, 397.

³ See Chap. vii.

The theory of the French philosophers that all the powers of government could be divided into three parts, each bearing a name descriptive only of itself, is not supported by the practical experience of Americans. There are functions that might as well be assigned to one of these parts as to another, or made into a fourth and called administrative.¹

The Constitution of the United States recognizes this in effect. It makes the Senate an executive council, as well as a legislative chamber. It allows Congress to vest the appointment of any inferior officers in the courts (Art. II, Sec. 3). In practice this power has been freely used.

The Supreme Court of the United States has had occasion to consider this question in connection with the statutes defining the jurisdiction of the Circuit Courts. It extends to certain "suits." But what is a suit? It is not necessarily a proceeding at common law or in equity or admiralty. It may be a statutory process. "Even," they say, "an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit within the act of Congress."² So in regard to a proceeding by the government to take land for public use on payment of due compensation, they observe that "the general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an

¹ Under authority of her present Constitution, Virginia in 1904 organized a State Commission for the Supervision of Corporations, which has both judicial and administrative functions.

² *Upshur County v. Rich*, 135 U. S. Reports, 467, 473.

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administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this act of Congress."¹

In one point of considerable importance express constitutional provisions generally narrow the jurisdiction of American, as compared with English courts. Each house of the legislature is made the final judge of the returns and qualifications of its members. In England, election contests as to a seat in the House of Commons has been made by Act of Parliament the subject of judicial determination. This avoids partizan decisions and is so far good. It diminishes, however, the independence of the legislative house in which the seat is contested. This is jealously guarded by our traditions as well as our Constitutions. The practice of wearing hats during the sessions of the House of Commons was an expression of the early feeling of the English Commons on this subject. They would not uncover before speaker or king. In some of the early American legislatures the same thing was done. Hats were occasionally worn in the House of Representatives at Washington as late as the second quarter of the nineteenth century.²

On the other hand, American courts interfere more readily than the English to protect a citizen from arrest by legislative authority. Each house of the

¹ *Ibid.*, 475.

² Hunt, "Life of Edward Livingston," 301. They were worn in the Continental Congress on occasions of ceremony. McMaster, "History of the People of the United States," I, 105.

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British parliament has large inherited powers over those who may treat it with contempt. Each house of an American legislature has some powers of this description, but they are far narrower ones.¹

¹ *Kilbourn v. Thompson*, 103 U. S. Reports, 168.

CHAPTER III

THE RELATIONS OF THE JUDICIARY TO THE POLITICAL DEPARTMENTS OF GOVERNMENT

COURTS of Claims are the only permanent special courts for the disposition of causes arising from the acts of public officials.¹ The system of administrative law prevailing on the Continent of Europe, by which all such matters are withheld from the ordinary tribunals, is totally unknown here. If the Secretary of War of the United States should do some act to a private citizen, which may be justified by his official powers, but otherwise would not be, he may be summoned to answer for it before any civil court having jurisdiction of the parties. So may even the President of the United States be sued after the expiration of his term.

The President, while President, however, cannot be compelled to obey a summons to appear in court. The country cannot spare him to go here and there in obedience to a writ. Chief Justice Marshall issued one against President Jefferson, directing him to appear at the trial of Aaron Burr and bring with him a certain paper. Jefferson declined to obey, and there was no attempt to enforce the subpœna. Had there

¹ One exists for the United States; and one for New York.

been, it would have been found that he had taken measures for his protection.¹ Marshall's action was based on an admission by the counsel for the government that a summons to testify could lawfully issue, though they denied that it could be accompanied by a direction to produce documents. This admission is now generally thought by the legal profession to have been ill-advised. If the President could be summoned at all, he could be compelled to obey the summons, and nothing could be more unseemly or inadmissible than an attempt of that nature by the judiciary against the executive power of the United States.

But while there is nothing like an administrative court for the disposition of causes against individuals in the United States, considered as a collection of States or of people within those States, more freedom has been used by Congress in providing for the Territories. This has been conspicuously the case in regard to the Philippines. By the Act of Congress of July 1, 1902, they were left under the supervision of the War Department, in which there was constituted a "Bureau of Insular Affairs," the business assigned to which "shall embrace all matters pertaining to civil government in the island possessions of the United States subject to the jurisdiction of the War Department; and the Secretary of War is hereby authorized to detail an officer of the army whom he may consider especially well qualified to act under the authority of the Secretary of War as the Chief of said Bureau." The officer filling the position of chief published in 1904 this account of the practical working of the

¹ Thayer, "John Marshall," 79.

provisions made for the disposition of matters of legal controversy occurring on the islands: "The establishment of a judicial system in the Philippines affords a means for the adjudication of litigated questions between the inhabitants and of many questions respecting the jurisdiction and authority of officials of that government. Whenever possible, controversies are referred to those tribunals. In some instances questions have arisen affecting the action or authority of officers of the executive department of that government in matters controlled by the discretion of the administrative branch and affecting the administration of civil affairs. These questions are considered and determined by the War Department, upon investigation and report by the law officer."¹

Under our American constitutional system, the only courts of an administrative or political nature for calling public officers directly to account for a breach of public duty are our courts of impeachment. These act only occasionally, and when specially convened for the purpose of hearing charges against a particular individual. They do not grant relief to any party injured by the wrongful acts which are the subject of the accusation. They sit only to punish the public wrong.

In constituting courts of impeachment, the control of the cause is generally given to officers of the legislative department, but judicial officers are often joined with them. Such a tribunal was long maintained in New York, of which the senators formed the majority, but in which the chancellor and judges of the Supreme

¹ *National Geographic Magazine* for June, 1904, p. 251.

Court also sat. The first Constitution of South Carolina, adopted in 1778, contained a similar provision (Art. XXIII).

In most States the Senate alone constitutes the court for trying impeachments, but should the Governor be thus brought before them, the Chief Justice is added to it, and presides. A similar provision is contained in the Constitution of the United States as respects the President. The main reason for putting such a proceeding under judicial direction is to avoid giving the second in rank of the executive magistracy, whose function it generally is to preside over the Senate, a position of authority over his chief, in a proceeding which, if successful, would put him in his place. It also, of course, tends to promote a trial in accordance with all the rules of law. The court in such a proceeding cannot be regarded as fully organized until the Chief Justice is present. It is then first competent to prescribe the rules to govern it during the progress of the cause. This was the ruling of Chief Justice Chase on the impeachment of President Johnson, which was tacitly acquiesced in by the Senate.

New York originally not only gave her legislature a share in judicial power, but her judges a share in that of legislation. Her Constitution of 1777 provided for a council of revision, consisting of the Governor, the Chancellor, and the judges of the Supreme Court, to whom all bills which passed the Senate and Assembly should be presented for consideration; and that if a majority of them should deem it improper that any such bill should become a law they should within ten

days return it with their objections to the house in which it originated, which should enter the objections at large in its minutes, and proceed to reconsider the bill; and that it should not become a law unless re-passed by a vote of two-thirds of the members of each house. For forty years this remained the law, and the Council of Revision contained from time to time judges of great ability, Chancellor Kent being one. During this period 6,590 bills in all were passed. One hundred and twenty-eight of them were returned by the Council with their objections, and only seventeen of these received the two-thirds vote necessary to re-enact them.¹

An obvious objection to this method of legislation is that the judges who, as members of a council of revision, find nothing objectionable in a bill presented for their scrutiny, must naturally have a certain pride of opinion to conquer before, should its constitutionality become afterward the subject of litigation before them, they could be in a frame of mind to render an unprejudiced judgment. One of the bills which came under the eye of Chancellor Kent as a member of the Council was afterward the source of controversy before him in court. He adhered to his original views, but was overruled by the Supreme Court of the United States. Chief Justice Marshall gave the opinion, and half apologetically alluded to this circumstance in these words:

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and

¹ Poore, "Charters and Constitutions," II, 1332, 1333, note.

their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.¹

A device for obtaining the same end—the views of the judges in advance of the enactment of a law—in a different way, has been from the first quite common. This is for the legislature to ask them specially for their opinion as to the constitutionality of a bill before it is put upon its passage. An analogous practice has always obtained in England, and was followed in several of the colonies.

Some of our State Constitutions expressly authorize such proceedings. In the absence of such authority, the judges can properly decline to comply with the request. It always asks them to prejudge a question which may later come before them in court, and to prejudge it without hearing any of the parties whom it may affect injuriously.²

President Washington, in 1793, brought a matter of this kind before the justices of the Supreme Court of the United States. It was during the controversy with M. Genet, the French minister, as to his right to refit

¹ *Gibbons v. Ogden*, 9 Wheaton's Reports, 1.

² See the Reply of the Judges of the Supreme Court of the General Assembly, 33 Conn. Reports, 586.

a captured English merchantman as a privateer at an American port, and then send her out for a cruise. By the advice of his Cabinet, the President asked the justices a series of questions comprehending all the subjects of difference as to the proper exposition of the provisions of our treaties with France under which her minister made claim. They replied that they deemed it improper to enter the field of politics by declaring their opinions on questions not growing out of some case actually before them.¹ No further request of this kind has since been made by any of the political departments to a court of the United States, except such as have been addressed to the Court of Claims.

Idaho, in her Constitution (Art. V, Sec. 25), has sought to give the legislature the benefit of judicial advice at the opening of each session as to what laws it might be desirable to enact. The judges of her trial courts are annually to report to those of her Supreme Court such defects and omissions in the laws as their knowledge and experience may suggest, and the latter, after considering these suggestions, are then, within the next five months, to report to the Governor such defects and omissions, both in the Constitution and in the laws, as they may find to exist.

The duty of the judiciary, in the course of lawsuits, to compare a statute, the validity of which is called in question, with the Constitution, and by the decision indirectly to affect legislation, is treated of elsewhere.²

¹ Marshall, "Life of Washington," V, 433, 441.

² Chap. VII.

The courts of the United States, in controversies involving matters affecting the foreign relations of the general government, acknowledge in a certain degree a dependence upon the executive department. If they have a treaty to construe, any construction of it as to the point in question already given by the State Department will be followed, unless plainly wrong. If it becomes material to determine whether a certain country is subject to a certain power, and the President of the United States has dealt with that question (as by recognizing or refusing to recognize a minister accredited to the United States), his action will be accepted as conclusive. His proceedings would have like weight if taken within the limits of his authority with respect to the government of one of the United States.¹

When questions of this nature arise in a lawsuit between private parties, the courts can, without notice to them, seek information by communicating directly with the Department of State. It will be given by a letter or certificate, and this will be received as a conclusive mode of proof or as aiding the court in taking judicial notice of historical facts.

So an official letter or certificate from the minister or consul of a foreign power can be received and used as evidence as to facts in controversy peculiarly within the knowledge of that government.²

In prize cases, which must all be brought before the District Court, an appeal is allowed directly to the Supreme Court of the United States, although

¹ *Luther v. Borden*, 7 Howard's Reports, 1.

² *Gernon v. Cochran*, Bee's Reports, 209.

the judgments of the District Court generally are reviewable only in an intermediate court. This secures a prompt decision by the highest judicial authority of a question which necessarily affects, in some degree, the foreign relations of the United States.

But there may be cases affecting a vessel claimed as a prize which are not brought to secure her forfeiture and so are not prize cases. They may even to a greater extent affect our relations to foreign governments. How far can the courts, in dealing with these, govern their action by that of the executive?

This question came up for decision shortly after the adoption of the Constitution. Great Britain and Spain were at war. A British man-of-war brought a Spanish felucca into Charleston, claiming her as a prize, and she was advertised for sale. No proceedings to have her adjudicated a lawful prize had been taken before any court. The Spanish consul applied to the Circuit Court for an injunction against the sale, claiming that for the United States to permit it would be a breach of neutrality and contrary to the law of nations. The British consul resisted the application on the ground that a sale could not be forbidden in the absence of any act of Congress on the subject, except by the President. The Chief Justice, who sat in the case, gave the opinion, which was that there could be no lawful sale without the permission of the United States; that it was a matter proper to be dealt with by the President; that the court would not say how he should deal with it; but that an injunction might issue to stop the sale until further order, unless

permission should be sooner obtained from the President.¹ Here, therefore, an act which might have been a *casus belli* was stayed by a court until and unless the Executive should intervene and permit it.

The extradition of criminals under a treaty on the demand of a foreign government presents a debatable ground in respect to the subject now under consideration. The surrender is an executive proceeding and a political act. But the laws may provide for a preliminary inquiry before a court into the propriety of complying with the demand. They certainly provide for a judicial proceeding by writ of *habeas corpus* to release any one arrested in such a proceeding if held without due cause. Is the court before which either of these proceedings may be had at liberty to receive advice or submit to instructions from the President of the United States?

This question stirred the country to its depths in 1799. Great Britain applied to our government for the extradition of a seaman who claimed to be an American citizen and was charged with committing murder on a British man-of-war. He was arrested in South Carolina, under a warrant from the District Judge, and lodged in jail. There was a treaty of extradition between the two powers covering cases of murder, but no particular machinery had been provided for regulating the surrender. The British consul asked the judge who had made the commitment to order his delivery to him. The judge doubted his power to do so. Thereupon the Secretary of State, by authority of the President, wrote him that the

¹ *Consul of Spain v. Consul of Great Britain*, Bee's Reports, 263.

President advised and requested him to make the surrender, if satisfied with the proofs of criminality, as he (the President) was of opinion that any crime committed on a man-of-war was committed within the territory of the power to which it belonged. The judge complied with this request, after a public hearing on a writ of *habeas corpus*, under which he ordered the man in question to be brought before him, and in the course of it this letter was shown to counsel on both sides.

The surrender became at once the subject of heated debates in Congress, but the President's course was ably and conclusively defended by Marshall on the floor of the House,¹ and the course pursued has since been followed in substance by our extradition statutes.² These provide for a hearing of a judicial character, and then, if that results in a determination that a surrender should be made, it may be ordered on a warrant from the State Department.

On the other hand, the peculiar provision of the Constitution of the United States which makes treaties the supreme law of the land calls upon the courts to enforce them according to whatever interpretation they may conclude to give them, even if it should differ from that adopted by the President or the State Department. If a treaty prescribes a rule by which the rights of private individuals are to be determined, and those rights are such as can be appropriately made the subject of a lawsuit, the court before which it may

¹ *United States v. Nash alias Robins*, Bee's Reports, 266; *Robbins' Case*, Wharton's State Trials, 392.

² *United States Revised Statutes*, Secs. 5270, 5272.

be brought has as full authority to construe the treaty as it would have to construe an act of Congress, were the matter in controversy one of a statutory nature. They cannot be appropriately made the subject of a lawsuit so long as the questions involved are under active consideration in the course of diplomatic negotiation and pending for decision before the President. Let him, however, once make his decision and the doors of the court fly open.

These principles are well illustrated by some incidents of our controversy with Great Britain over the seal fisheries in Behring Sea. There was a serious dispute between the two governments as to the limits of our jurisdiction over the waters adjacent to Alaska. We maintained that it ran to the middle of Behring's Straits and from the meridian of 172° to that of 193° west longitude. Great Britain contended for the three-mile limit. Pending diplomatic negotiations as to this point, one of our revenue cruisers seized a Canadian vessel which was engaged in seal fishing nearly sixty miles from the Alaskan coast, and she was condemned, on a libel by the United States, by an admiralty court in Alaska.

The owner in 1891 applied to the Supreme Court of the United States for a writ to prohibit the enforcement of this decree of confiscation. The Attorney-General of Canada filed in this suit papers in aid of the application, stating that he did so with the knowledge and approval of the imperial government, and that he would be represented by counsel employed by the British minister resident. The writ was refused on technical grounds, but the court, through Chief

Justice Fuller, made these observations as to the merits of the cause:

In this case, Her Britannic Majesty's Attorney-General of Canada has presented, with the knowledge and approval of the Imperial government of Great Britain, a suggestion on behalf of the claimant. He represents no property interest in the vessel, as is sometimes done by consuls, but only a public political interest. We are not insensible to the courtesy implied in the willingness thus manifested that this court should proceed to a decision on the main question argued for the petitioner; nor do we permit ourselves to doubt that under such circumstances the decision would receive all the consideration that the utmost good faith would require; but it is very clear that, presented as a political question merely, it would not fall within our province to determine it. . . . We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."¹

In the following year a convention was concluded between the United States and Great Britain for the submission of the question of our jurisdiction over Behring's Sea to arbitration. The arbitration took place and the award supported the British contention. Congress passed an act to give it full effect. The convention provided in terms that "the high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration as a full, perfect

¹*In re Cooper*, 143 United States Reports, 472, 503.

and final settlement of all the questions referred to by the arbitrators.”

In July, 1891, before the award was made, an American vessel engaged in the seal fishery outside the three-mile limit was seized by one of our revenue cutters. A libel was filed by the United States in the admiralty court for Alaska and she was condemned. Her owners appealed to the Circuit Court of Appeals, on the ground that the seizure was made outside of the jurisdiction of the United States. If so, they were entitled to her release. The court held that the limits of this jurisdiction were conclusively settled by the award, and thus adverted to the claim that they should treat the case as the Supreme Court of the United States had dealt with that which followed the seizure of the year before:

This question has been settled by the award of the arbitrators, and this settlement must be accepted “as final.” It follows therefrom that the words “in the waters thereof,” as used in section 1956, and the words “dominion of the United States in the waters of Behring Sea,” in the amendment thereto, must be construed to mean the waters within three miles from the shores of Alaska. In coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that, in pending controversies, doubtful questions which are undecided must be met by the political department of the government. “They are beyond the sphere of judicial cognizance,” and “if a wrong has been done, the power of redress is with Congress, not with the judiciary.” *The Cherokee Tobacco*, 11 Wall., 616-621. But in the present case there is no pending question left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has

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become final. A treaty when accepted and agreed to becomes the supreme law of the land." . . . The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time *in re Cooper* was decided, it has receded therefrom since the award was rendered, by an agreement to accept the same "as a full, complete, and final settlement of all questions referred to by the arbitrators," and from the further fact that the government since the rendition of the award has passed "an act to give effect to the award rendered by the tribunal of arbitration."¹

The degree of confiscation was therefore reviewed. It will be noticed that this result was reached in a suit by the United States in one of their own courts, in which the claim of the government was one of territorial boundary, and yet that the court overruled the claim and threw out the suit on the strength of an award made in pursuance of the law of the land. The treaty was the law. This law provided for the award and made it, whichever view should be adopted, final. It was therefore for the court to accept it as final, even against the resistance of the political department of the government, and do justice accordingly.

The courts before the Revolution, and in some States for half a century after it, served as a kind of political mouthpiece. The institution of the grand jury² afforded the means. Those composing it are personally selected by the sheriff from the principal men in the county. It is the duty of the court to instruct them at the opening of the term which they

¹ The *La Ninfa*, 75 Federal Reporter, 513, 517.

² See Chap. XVII.

are summoned to attend as to the law and practice governing the exercise of their functions. Frequently this charge was prefaced by an harangue from the judge on the social, moral, religious or political questions of the day.¹ To this the grand jury were not backward in responding with compliments and perhaps presentments.

In Massachusetts they went even further in 1774. The House of Representatives of the Provincial Assembly impeached the Chief Justice for accepting a salary from the Crown instead of relying on legislative grants, as had been the practice. The Council before which the articles were exhibited declined to entertain them. The people, however, felt that the House was right, and this sentiment was manifested at the next sessions of the courts by the grand and petit juries in every county. They refused to take the oaths and stated that they could not take part in proceedings presided over by a judge who was under impeachment. No business was done in court until the following year, when, after the battle of Lexington, new judges were appointed by the Council.²

Sometimes the laws of the State were criticised in this way by judge and jury.

In December, 1788, a grand jury in South Carolina made this presentment:

We present as a grievance of the greatest magnitude the many late interferences of the legislature of the State in private contracts between debtor and creditor. We should

¹ "Life and Works of John Adams," II, 169.

² "Life and Works of John Adams," II, 332; x, 240; "Principles and Acts of the Revolution," 100.

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be wanting in our duty to our country and regardless of the obligation of our solemn oath and the high trust at this time devolving upon us by operation of the laws of the land, did we omit this occasion between the expiration of one legislature and the meeting of a new representative body, to express our utter abhorrence of such interferences.¹

In a similar way unpopular treaties² or acts of Congress were formerly attacked. In 1819, the action of the House of Representatives as to the introduction of slavery in Missouri was the subject of a warm protest from a grand jury in that territory, which closed thus:

They hope those restrictions will never more be attempted; and, if they should, they hope by the assistance of the genius of '76 and the interposition of Divine Providence to find means to protect their rights.³

The protective tariffs of the United States were frequently presented as grievances in the South during the years preceding the nullification movement in South Carolina.⁴

In 1825, a grand jury in Pennsylvania presented as a grievance the suspension of Commodore Porter from duty for six months under sentence of a naval court martial, approved by the Secretary of the Navy.⁵ In 1827, a grand jury in Tennessee presented a "protest

¹ "American Museum," VII, Appendix II, 10. *Cf. ibid.*, 19.

² McMaster, "History of the People of the United States," II, 229.

³ Niles' Register, XVII, 71.

⁴ U. B. Phillips, "Georgia and State Rights," Report of the American Historical Association for 1901, II, 117.

⁵ Niles' Register, XXIX, 103.

against the bold and daring usurpations of power by the present Executive of the United States" (John Quincy Adams), and stated that "being decidedly opposed to the present administration, we have for ourselves resolved to oppose all those we have just reason to suspect to be friendly thereto, and recommend the same course to all our fellow citizens of Blount County."¹

In 1777, the Chief Justice of South Carolina began his charge to a grand jury with a long statement of the justice of the Revolution, its military successes, and the duties of patriotism. The court thereupon ordered "That the political part of the Chief Justice's charge" be forthwith printed.²

In 1790, Judge Grimke of the same State took advantage of a similar occasion to comment with severity on those who had opposed the ratification of the Constitution of the United States. Jealousy had done much to poison their minds, he said, "for it is observable that throughout the whole of the United States a majority of the leaders of the opposition to our newly adopted government are not natives of our soil; hence this pernicious quality of the mind displays itself more widely in America."³

In 1798, when Elbridge Gerry was the Republican candidate for Governor of Massachusetts, a Federalist newspaper reported approvingly a charge of Chief Justice Dana of that State. He had been an ardent politician before going on the bench and had declined

¹ Niles' Register, XXXII, 366.

² Principles and Acts of the Revolution," 347.

³ "American Museum," VIII, Appendix II, 33.

a nomination as minister to France during the preceding year. "The learned judge," said the *Boston Centinel*, "in a forcible manner proved the existence of a French faction in the bosom of our country and exposed the French system among us from the quintumvirate of Paris to the Vice-President and minority of Congress as apostles of atheism and anarchy, bloodshed and plunder."¹

In 1800, Justice Chase of the Supreme Court of the United States made several charges in Maryland hardly less objectionable, one of which was afterward unsuccessfully set up by the House of Representatives as a ground of his impeachment. The article stating it described the charge as "an intemperate and inflammatory political harangue with intent to excite the fears and resentment of the said grand jury and of the good people of Maryland against their state government and Constitution." He had, indeed, used this language:

You know, gentlemen, that our State and national institutions were framed to secure to every member of the society, equal liberty and equal rights; but the late alteration of the federal judiciary by the abolition of the office of the sixteen circuit judges, and the recent change in our State constitution, by the establishment of universal suffrage, and the further alteration that is contemplated in our State judiciary (if adopted) will, in my judgment, take away all security for property and personal liberty. The independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this State will be entirely destroyed if the bill for the

¹*Centinel* of Nov. 28, 1798, quoted in Austin, "Memoirs of Elbridge Gerry," II, 296, note.

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abolition of the two supreme courts should be ratified by the next general assembly. The change of the State constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments. I can only lament that the main pillar of our State constitution has already been thrown down by the establishment of universal suffrage. By this shock alone the whole building totters to its base and will crumble into ruins before many years elapse, unless it be restored to its original state.

All this was less indefensible under the judicial practice of a century ago than it would be now, and there were not enough votes of Guilty on the article of impeachment founded upon it to secure a conviction.

In the same year, Judge Alexander Addison of the Circuit Court of Pennsylvania was charging a Pennsylvania grand jury that the Jeffersonians had assumed a name that did not belong to them. "Such men," he said, "disgrace the name of Republicans by exclusively assuming it. In their sheep's clothing they are ravening wolves."¹ For this, among other things, he was very properly impeached and removed in 1803, after the Republicans came into power in that State.²

It is difficult for the American of the twentieth century to conceive how honorable men could so have abused official position.³ The cause lies in the extreme

¹ Wharton's State Trials, 47, note.

² McMaster, "History of the People of the United States," III, 154.

³ Wharton's State Trials, 376. Justice Washington made it a rule not to enter into any political questions in his charges

rancor which then embittered politics and debased society. Federalists and Republicans were hardly on speaking terms. Many who were actively engaged in politics felt compelled to carry a sword cane for defence if attacked. Judge Addison's charge brought out an open letter to him in a Pittsburgh newspaper, signed by a Republican who was on the Supreme bench of the State, expressing his astonishment that the people who heard him "were not fired with sudden indignation and did not drag you from your seat and tread you under foot."¹ On the other hand, at a political banquet of the Boston Federalists, at about the same time, their approval of Judge Dana's charges to grand juries was manifested by this toast: "The Honorable Francis Dana, Chief Justice of the learned Associate Judges of our Supreme Judicial Court. While the political opinions delivered from the bench are dictated by intelligence, integrity and patriotism, may they be as highly respected as have ever been its judicial decisions."²

The judiciary may, and often do, command and compel inferior executive officers to do specific official acts which it is their plain duty to perform, or issue an injunction to prevent their doing an official act which is plainly beyond their powers. Heads of Departments of the State or the United States are subject

unless necessary for the guidance of the grand jury in the work before them, and until 1817, when party feeling had moderated, not to give out copies of any charges for publication. Niles' Register, XIII, 169.

¹ Wharton's State Trials, 47, note.

² Austin, "Life of Elbridge Gerry," II, 297, note.

to this power.¹ So in the Federal Courts are Governors of States acting under a law repugnant to the Constitution of the United States.² No such writ will be issued, however, when the case is of a political nature and involves the exercise of any official discretion,³ nor under any circumstances against the President of the United States.⁴ As to whether it can in some cases be granted by a State court against the Governor there is a conflict of authority.

The development of party government in the United States has led of recent years to much legislation for the regulation of party conventions and party organization in the interest of fair dealing and public order. Statutes of this nature relating to the form and heading of ballots for use at popular elections are common. If conflicting factions contend for the right of issuing ballots in the name of the same party, the courts may be called upon to decide between them on an application for an injunction or writ of mandamus. The legislature, however, may provide that some standing agency or committee of a party shall decide finally upon any such conflicting claims, and in such case their decision will be conclusive upon the courts.⁵

When title to a political office is contested, the courts, unless there is some constitutional provision to the contrary, may be appealed to for a decision. This

¹ *Noble v. Union River Logging Co.*, 147 U. S. Reports, 165; *Smyth v. Ames*, 169 U. S. Reports, 466.

² *Pennoyer v. McConaughy*, 140 U. S. Reports, 1.

³ *Georgia v. Stanton*, 6 Wallace's Reports, 50.

⁴ *Mississippi v. Johnson*, 4 Wallace's Reports, 475.

⁵ *State v. Houser*, Wisconsin Reports; 100 Northwestern Reporter, 964.

is true even in respect to the office of Governor.¹ It is a remedy which has been, though in rare instances, abused for party purposes.²

The right of the Governors, which exists under the Constitutions of several States, to ask the judges of the Supreme Court for their opinion on any question of law, may throw upon them the delicate task of deciding in a collateral proceeding who is Governor, if the title to the office is claimed by two. This was the case in Florida in 1869. The House of Representatives had commenced proceedings of impeachment against the Governor. It was on the first day of a special session of the Assembly. There could be no such session unless a quorum was present in each house. There were but twelve Senators in attendance. The Lieutenant-Governor regarded the proceedings as regular, and assumed to exercise the office of Governor pending the trial. The Governor claimed that twelve Senators were not a quorum, and that the proceedings were void. On these points he requested the opinion of the Justices of the Supreme Court, and they gave one supporting his contentions.³ A few weeks later a regular session was held, at which a quorum was

¹ *Boyd v. Thayer*, 143 U. S. Reports, 135; *Taylor v. Beckham*, 178 U. S. Reports, 548; *State v. Bulkeley*, 61 Connecticut Reports, 287.

² Such a case was the issue by a District Judge of the United States in 1872 of an injunction-order under which the Marshal took possession of the Louisiana State-house, and excluded those claiming to be the legislature of the State. Gibson, "A Political Crime," 347 *et seq.*; Senate Report, 457, Forty-second Congress, third session.

³ 12 Florida Reports, 653.

present in each house, and the proceedings of the special session were treated as void.¹

In the early days of the United States, under the present Constitution, the Chief Justices of the Supreme Court of the United States at times filled also a political office, and so were invested at the same time with political and judicial functions. John Jay, the first Chief Justice, while holding that office, was made our Envoy Extraordinary to Great Britain, and spent a year abroad in that capacity. His acceptance of the position, however, occasioned general and unfavorable comment. John Marshall was both Chief Justice and Secretary of State for five weeks, during which he held one term of the Supreme Court. Oliver Ellsworth was both Chief Justice and minister to France at the same time, and for a period of over a year, during which he held one term of court.

Nothing of this kind has since occurred, nor would it now be thought consistent with the proprieties of judicial office.

When the result of the election of the President and Vice-President of the United States was contested in 1877, Congress, as a temporary makeshift, bridged over the difficulty by creating a commission of fifteen, five from each house and five from the Supreme Court, to decide upon the returns. Four of the justices were especially selected by the act passed for this purpose, two of them being Republicans and two Democrats, and they were directed to choose the fifth.² They agreed on Justice Bradley, a Republican. The Con-

¹ S. S. Cox, "Three Decades of Federal Legislation," 518, 520.

² 19 United States Statutes at Large, 228.

gressional members were equally divided politically. The result proved to be that on every important question in controversy every Republican voted for the view favorable to the Republican candidates and every Democrat voted for the other. The country could not fail to see that judges, as well as other public men, may be insensibly influenced by their political affiliations, and regarded the whole matter as a new proof of the wisdom of separating the judiciary from any unjudicial participation in the decision of political issues.¹

Justices of the Supreme Court have since sat on international tribunals of arbitration, but this is, or should be, a strictly judicial proceeding.

In the State Constitutions, the judges of the highest courts are now often expressly forbidden to accept other office,² but in the absence of such a prohibition it would be considered as unbecoming. Formerly and during the first third of the nineteenth century this was in many States not so. Some were then judges because they held legislative office and as an incident of it. Others did not hesitate to accept political positions. Of the six Federalist electors chosen in New Hampshire at the presidential election of 1800, three were judges of her Supreme Court.³

Judges have frequently taken part in constitutional conventions of their States. In Virginia, Chief

¹ See Wilson, "Division and Reunion," 286; S. S. Cox, "Three Decades of Federal Legislation," 655; Pomeroy, "Some Account of the Work of Stephen J. Field," 440.

² See Chap. XXII.

³ Wharton's State Trials, 47.

Justice Marshall was a member of that of 1829, and Judge Underwood of the District Court presided over that of 1867. Chancellor Kent and Chief Justice Spencer were members of that of 1821 in New York.

It may well be doubted if the advantages to be gained by their counsel in such a position are not outweighed by the evil of exposing it to criticism as dictated by selfish considerations. A member of the New York convention thus alluded upon the floor to the measures supported by the Chief Justice and Chancellor:

He regretted that such an opinion and plan had been proposed by the Chief Justice. It must have arisen from the politics of the Supreme Court. The judges of that court had been occupied so much in politics that they had been compelled to press upon the public a system that had nothing else to recommend it than such a relief to themselves from the burthen of official duties as would leave them to the free exercise of their electioneering qualifications. But for this, the Chief Justice might have shown a Holt, or a Mansfield. The elevated character of the Chancellor had been often asserted and alluded to. He meant no disrespect to that honorable gentleman. He respected him as highly as any man when he confined himself to the discharge of the official duties of his office; but when he stepped beyond that line; when he became a politician, instead of being his fancied oak, which, planted deeply in our soil, extended its branches from Maine to Mexico, he rather resembled the Bohon Upas of Java, that destroyed whatever sought for shelter or protection in its shade.¹

The pardoning power is essentially of a political nature. Judicial officers are to do justice. Mercy is an act of policy or grace. A pardon after conviction

¹ Reports of the Proceedings and Debates of the Convention of 1821, 615.

presupposes guilt. Nevertheless, in a few States this royal prerogative of pardoning has been committed to a board of officers, headed by the Governor, of which some of the judiciary are members. There is this advantage in it, that judges know best how fully circumstances of extenuation are always taken into account by the court before pronouncing sentence, and therefore cannot but exercise a restraining power against the influences of mere sentimental promptings to inconsiderate clemency.

It may be said, in general, that the tendency towards keeping the judiciary apart from any active connection with the executive department has steadily increased since the first quarter of the nineteenth century.

When our position as a neutral power, in 1793, involved us in serious questions affecting the rights of Great Britain and France, Washington's cabinet advised him that the ministers of those countries be informed that the points involved would be referred to persons learned in the law, and that with this in view the Justices of the Supreme Court of the United States be invited to come to the capitol, six days later, "to give their advice on certain matters of public concern, which will be referred to them by the President."¹ Nothing of this nature would now be dreamed of, under any conditions.

¹ Jefferson's Writings, Library Ed., I, 370.

CHAPTER IV

THE FORCE OF JUDICIAL PRECEDENTS

THE antipathy to legal codification, which, until recent years, was a characteristic both of the English and American bar, and still prevails, though with diminishing force, has given, and necessarily given, great force to judicial precedents. It is mainly through them that with us unwritten law passes into written law. Precedent is a fruit of reason ripened by time. Time, it has been said, is the daughter of Antiquity and takes place after Reason, which is the daughter of Eternity. Precedent rests on both. A legal code framed in any American State is little more than the orderly statement of what American courts have decided the law to be on certain points.

When reason is set to work upon the solution of a problem growing out of the affairs of daily life, it often happens that two minds will pursue different paths and perhaps come to different results. Not infrequently neither result can fairly be pronounced untenable. An English judge has said that nine-tenths of the cases which had ever gone to judgment in the highest courts of England might have been decided the other way without any violence to the principles of the common law.

Every lawsuit looks to two results: to end a con-

troversy, and to end it justly; and in the administration of human government the first is almost as important as the last.¹ Certainty is of the essence of justice; but among men and as administered by their governments it can only be such certainty as may be attained by an impartial, intelligent, and well-trained judge. If such a judge has, after a proper hearing, declared what, under a particular set of circumstances, the law is which determines the rights of the parties interested, this declaration makes it certain, once and forever, as far as they are concerned, and helps to make it certain as to any others in the future between whom there is a controversy under circumstances that are similar. If it is the declaration of a court of supreme authority it is ordinarily accepted as of binding force by any inferior courts of the same government, and treated with great respect and as high evidence of the law by any other of its superior courts, as well as by courts of other States before which a similar question may be presented.

A decision on a point of law by the highest court in a State does not, however, bind its lower courts as absolutely as would a statute. An inferior court may disregard it and decide the same point another way if it be fully satisfied that the action taken by the court above was ill-considered and erroneous. It is possible that in such event, on reconsideration, the court of last resort may reverse its original position.² If not, that acquires by this attack a double force.

¹ *Hoyt v. Danbury*, 69 Conn. Reports, 341, 349.

² A good instance of this is furnished by the case of *Johnson v. People*, 140 Illinois Reports, 350; 29 *Northeastern Reporter*,

Chief Justice Bleckley of Georgia once remarked that courts of last resort lived by correcting the errors of others and adhering to their own. Nevertheless, they have often, years after formally announcing a certain legal doctrine in one of their opinions, declared it to be unsound, and overruled the case in which it was laid down. They do this, however, with natural and proper reluctance, and never if this doctrine is one affecting private rights of property and has been followed for so long a course of time that it may be considered as a rule on which the people have relied in exchanging values and transferring titles.

The public, however, have rights to be regarded as fully as individuals, and if a right of private owner-

895. In *McFarland v. People*, 72 Illinois Reports, 368, the Supreme Court had stated in its opinion, that if two unimpeached witnesses gave the only testimony as to a certain point material to the plaintiff's case, and testified in contradiction of each other, the case failed for want of proof. Many years later a charge to the jury to this effect was asked and refused in an inferior court. An appeal was taken to the Supreme Court, and there Mr. Justice Schofield, the author of the original opinion, thus disposed of it: "Although in *McFarland v. People*, 72 Ill., 368, the writer of this opinion expressed the belief that a similar instruction was free of legal objection, his remarks in that respect were unnecessary to a determination of the case then before the court, and they were made without sufficient consideration, and are manifestly inaccurate. They are now overruled. The question of competency is one of law, and therefore for the court; but the question of credibility,—that is, of worthiness of belief,—and therefore the effect of the competent evidence of each witness, is one of fact, and for the jury."

ship has been adjudged to exist, which involves a public loss, the precedent thus created might be overruled with less hesitation than one would be determining rights and correlative obligations that were purely private. Thus the North Carolina courts for seventy years held that a public office was the private property of the incumbent. No other courts in the United States took that view, and it has, by a recent decision, been repudiated in North Carolina.¹

Still more are public interests to be regarded when a question arises as to reversing a decision as to the proper construction of a constitutional provision. If a judicial mistake be made in construing a statute it is easily remedied. The next legislature can amend the law. But a Constitution can only be amended with extreme difficulty and by a slow process. If the court falls into error as to its meaning, the correction must ordinarily come from its own action or not at all. Hence an opinion on a matter of constitutional construction is less to be regarded as a final and conclusive precedent than one rendered on a matter of mere private right.

It has been the position of some American statesmen and jurists that judicial decisions on points of constitutional construction were not binding upon the executive or legislative department of the government. President Jackson asserted this with great force in his message to the Senate of July 10, 1832, disapproving the re-charter of the Bank of the United States. He conceded, however, that a judicial precedent may

¹ *Mial v. Ellington*, 134 North Carolina Reports, 131; 46 South-eastern Reporter, 961; 65 Lawyers' Reports Annotated, 697.

be conclusive when it has received the settled acquiescence of the people and the States. But while such acquiescence may strengthen the authority of a decision, it can hardly be regarded as that which gives it authority. That comes from the fact that it is an exercise of the judicial power of the government in a case for the disposal of which this judicial power has been properly invoked.

The decision of the court in *McCulloch v. Maryland*¹ unquestionably settled forever, as between the cashier of the bank and the State of Maryland, that the bank was a lawful institution. That in *Osborn v. The Bank of the United States*² reaffirmed it as between the bank and the Treasurer of the State of Ohio. It would be intolerable if such judgments were not in effect equally conclusive for the determination of all controversies between all men and all States growing out of the creation of such a corporation. Practically, then, the opinion of the executive department to the contrary could only be of importance in such a case as Jackson had in hand; that is, in its influencing executive action in approving or disapproving some proposed measure of legislation. It could not disturb the past.

The authority of a judicial precedent is weakened if it comes from a divided court, and especially if a dissenting opinion is filed in behalf of the minority. A silent dissent indicates that the judge from whom it proceeds is not so impressed by the fact, or the impor-

¹ 4 Wheaton's Reports, 316. See Willoughby, "The American Constitutional System," 44, 123.

² 9 Wheaton's Reports, 738.

tance to the public, of what he deems the error of the majority that he thinks it worth while to express the reasons which lead him to differ from them.

No departure from precedent in any American court has ever awakened so much feeling as that by the Supreme Court of the United States in 1872, when it decided that Congress could make government notes a legal tender for debts contracted before the law was passed.¹ It had held precisely the contrary two years before,² but it was by a bare majority and in the face of a strong dissenting opinion. In the opinions filed in the second case stress was laid upon this division of the court.³

The word "established" is often used to describe the kind of precedent to which courts are bound to adhere. What serves to establish one? Long popular usage, repeated judicial affirmations, and general recognition by approved writers on legal topics. Of these, in fact, the last is probably the most powerful. Lawyers and courts, in countries without codes, get their law mainly from the standard text-books. Such authors as Coke, Blackstone, Kent and Cooley are freely cited and relied on as authorities by the highest tribunals.⁴ It is by the writings of such men that

¹ The Legal Tender Cases, 12 Wallace's Reports, 457, 529.

² *Hepburn v. Griswold*, 8 Wallace's Reports, 603.

³ 12 Wallace's Reports, 553, 569. See George F. Hoar, "Autobiography," I, 286.

⁴ See, for instance, *Western Union Telegraph Co. v. Call Publishing Co.*, 181 United States Reports, 101; *Louisville Ferry Co. v. Kentucky*, 188 United States Reports, 394, 397.

judicial precedents are sifted and legal doctrines finally clothed in appropriate terms and arranged in scientific order.

The English courts long ago declared it to be a rule of law to prevent perpetuities that no estate in lands could be created which was not to commence within the compass of a life or lives of persons then existing, with an exception intended to favor a minor heir. American courts accepted this rule, but some of them construed it as meaning that no estate in lands could be created which was to continue after the expiration of such a period. This construction was shown by Professor John C. Gray, in a work on "Perpetuities," to be unwarranted, and since its publication the cases which had proceeded on that basis have been generally treated as erroneous.

The nature of a legal presumption, also, had been misconceived by several American courts. It had been treated as evidence of facts.¹ Professor J. B. Thayer, in his "Preliminary Treatise on Evidence,"² argued so forcibly against this view that in at least one State a decision in which it had been taken has been formally overruled.³

The Court of Appeals of New York once held in a carefully prepared opinion that a railroad might be built along the shore of a navigable river, under authority from the State, without first making compensation to the riparian proprietors, whose access to

¹ *Coffin v. United States*, 156 United States Reports, 432.

² Pages 337, 566-575.

³ *Vincent v. Mutual Reserve Fund Life Association*, 77 Connecticut Reports, 281, 291; 58 Atlantic Reporter, 963.

the waters might thus be obstructed.¹ In a text-book written by Chief Justice Cooley, this decision was justly criticised,² and not long after the publication of that work it was formally overruled.³ It is safe to say that its fate was largely the result of the comments thus made by a distinguished jurist, whose only motive could be to maintain the integrity and consistency of legal science.

The general doctrine of the courts, which is commonly expressed by the rule "*stare decisis*," was never better stated than by Chief Justice Black of Pennsylvania, in these words:

When a point has been solemnly ruled by the tribunal of the last resort, after full argument and with the assent of all the judges, we have the highest evidence which can be procured in favor of the unwritten law. It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. . . .

A palpable mistake, violating justice, reason and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutantur*. We change with the change of the times, as

¹ Gould v. Hudson River Railroad Co., 6 New York Reports, 522.

² Cooley on Constitutional Limitations, 670.

³ Rumsey v. New York and New England Railroad Co., 133 New York Reports, 79; 30 Northeastern Reporter, 654; 15 Lawyers' Reports Annotated, 618.

necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people.¹

Generally, overruling a former decision is due to a change of circumstances, which has given the court a new view-point. A marked instance of this occurred in 1851, in proceedings before the Supreme Court of the United States. More than a quarter of a century before, a suit in admiralty for seamen's wages on an inland river had been dismissed by the District Court of Kentucky for want of jurisdiction, and on appeal this action had been affirmed. Mr. Justice Story gave the opinion of the court, and said that a court of admiralty could only take cognizance of such a claim when the services were rendered at sea or upon waters within the ebb and flow of the tide.² This was undoubtedly a true statement of what had always been the doctrine of both English and American courts. But out of what did this doctrine spring? From the fact that in England there were no navigable waters except those in which the tide ebbed and flowed, and that in the United States, up to that time, there were none of a different kind which had been largely used for commercial purposes. Twenty years passed. Steam navigation had opened the great lakes and the great rivers of the country to a profitable carrying trade. The day was dawning when the bulk of

¹ *McDowell v. Oyer*, 9 Harris' Reports, 423.

² *The Thomas Jefferson*, 10 Wheaton's Reports, 428.

American shipping was to be employed upon them. A suit in admiralty was brought against a ship for sinking another on Lake Ontario. The defendants put in an answer relying on the doctrine laid down by Story. The District Court overruled it. The case came by appeal to the Supreme Court, and in an opinion by Chief Justice Taney the appeal was dismissed. "The conviction," he said, referring to the opinion of Mr. Justice Story, "that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States. . . . These lakes are in truth inland seas. Different States border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other. . . . The case of the *Thomas Jefferson* did not decide any question of property or lay down any rule by which the right of property should be determined. . . . The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced

that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it.”¹

But without any change of circumstances, the proper desire of all American courts to keep their common law in harmony with that of the other States is often sufficient to induce the abandonment of a doctrine once distinctly asserted.² The consistency of American law as a whole is immeasurably more important than the consistency of the law of any single State.

Sometimes a court of last resort treats a doctrine which it had formerly asserted as manifestly unsound and abandons it without stopping to give a reason or even to overrule the decision which first announced it.

Illinois for a long generation adopted the rule that if an injury occurred to one man through the concurring negligence of himself and another, but his negligence was slighter than that of the other, he might hold the latter responsible for the damages suffered.³ It was not a doctrine justified by the common law nor generally held in this country, and in 1894 the Supreme Court of the State refused to recognize it, with little or nothing more than this brief *ipse dixit*: “The doctrine of comparative negligence is no longer the law of this court.”⁴

¹ The Genesee Chief, 12 Howard’s Reports, 443, 451.

² City of South Bend v. Turner, 156 Indiana Reports, 418; 60 Northeastern Reporter, 271.

³ Andrews, “American Law,” 255, 1027.

⁴ Lanark v. Dougherty, 153 Illinois Reports, 163; 38 Northeastern Reporter, 892.

Occasionally a case is overruled because it has been forgotten.

An early decision in Massachusetts (*Loomis v. Newhall*¹) had affirmed the position that if a statute required contracts of a certain kind to be put in writing, and a contract of that kind, but embracing also a different and distinct matter not touched by the statute, was made orally, it was wholly void. Such a rule was illogical and unsound, and in a later decision the same court, forgetting that it had indorsed it, said so, and said so when it was not necessary to the decision.² Subsequently, both these cases having been brought to its attention, it affirmed the latter, though remarking that "what was there said on this point was not essential to the decision of that case, and would have been omitted or modified if *Loomis v. Newhall* had been then remembered."³

The authority of an opinion as a precedent on any point is always proportioned to the necessity of determining that point in order to support the judgment which was rendered. Some judges write treatises instead of decisions or in addition to decisions. Whatever goes beyond that which is required to show that the judgment is the legal conclusion from the ascertained facts is styled in law language *obiter dictum*. It may be interesting and even persuasive, but it is not an authoritative statement of law.

It may grow to be such by adoption in subsequent cases. The Court of King's Bench in England was

¹ 15 Pickering's Reports, 159.

² *Irvine v. Stone*, 6 Cushing's Reports, 508, 510.

³ *Rand v. Mather*, 11 Cushing's Reports, 1, 5.

called on, at the beginning of the eighteenth century, to say whether if a man undertook as a friendly act, and not for pay, to cart another's goods, and did it carelessly, he was bound to answer for any damage that might result. There were four judges who heard the case, of whom three gave their opinions.¹ Two of these opinions were confined to the precise point of law on which the case turned. In the third, Chief Justice Holt seized the opportunity to lay down the law of England as to all sorts of contracts arising out of the reception by one man of the goods of another. This he did mainly by setting forth what were the rules of the Roman law on the subject, but not referring to their Roman origin, and quoting them, so far as he could, from Bracton, an English legal writer of the thirteenth century, who had also stated them as English law.

For four or five centuries these rules had been laid down in an unofficial treatise, but the courts had not fully recognized them. Now the Chief Justice of England had given such recognition in the amplest manner. Meanwhile the trade of England had reached a point at which some definite rules on all these matters had become of the utmost importance. The bar were only too glad to advise their clients in accordance with Lord Holt's opinion. It was not long before it was universally practiced upon, and no case in the English language touching contract relations of that nature is of greater importance as a precedent. Yet it became such not because of its intrinsic authority as a judgment, so much as on account of its

¹ *Coggs v. Bernard*, Lord Raymond's Reports, 909.

orderly and scientific statement of a whole body of law of a kind that the people needed and for the origin of which—whether at Rome or London—they cared little, so long as it had been accepted by the highest judicial authority in the realm.

On the other hand, the greatest judges have often, in delivering the opinion of the court, asserted doctrines the consideration of which was not essential to the decision, and later retracted the assertion on fuller consideration or seen the court in a later case retract it for them.

Two of the great opinions of Chief Justice Marshall are *Marbury v. Madison*¹ and *Cohens v. Virginia*.² In the first the court held that it had no jurisdiction to command the Secretary of State to deliver a commission executed under the preceding administration, because, although Congress had assumed to confer it, Congress had no power to do so; and in defending this position Marshall observed that the Constitution defined the jurisdiction of the Supreme Court over cases brought there in the first instance, and that in this clause of the Constitution affirmative words had the force of negative words so far as to exclude jurisdiction over any other cases than those specifically mentioned. In the second case this observation was relied on by Virginia to defeat the power of the court to review a State judgment. But, said the Chief Justice, “it is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which

¹ 1 Cranch's Reports, 137.

² 6 Wheaton's Reports, 264.

those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. . . . In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision some expressions are used which go far beyond it. . . . The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case or the tenor of its reasoning." He then proceeded to dispose of the case in hand by saying that Virginia having obtained an erroneous judgment against Cohens, Cohens had a right to appeal, and the suit still remained a suit by a State against him and not by him against a State. Unfortunately, here again came in next an *obiter dictum*. If, he said, this were not so, there was another principle equally decisive in support of the jurisdiction, namely, that the Constitution gave the United States judicial power over all cases arising under the Constitution or laws of the United States without respect to parties. Nearly a hundred years later a State was sued in the courts of the United States on a cause of

action arising under the Constitution, and *Cohens v. Virginia* was relied on as a precedent. "It must be conceded," was the reply of the Supreme Court, "that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense extra-judicial, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."¹

It may be added that decisions on a point not material to the cause are generally made without the benefit of previous argument by counsel. The lawyers will naturally address themselves to the controlling questions, and if well trained will see what these are quite as clearly as the court. It is the argument at the bar, in which different views of law are presented and each defended by men of learning and ability, which enables the judge, after hearing both sides and weighing all that is said in behalf of one against all that is said in behalf of the other, to come to the true conclusion. The Romans recognized this in their rule as to the force of precedent in a matter of customary law. The first thing to ask was whether "*contradicto aliquando iudicio consuetudo firmata sit.*"²

The retrospective effect which a refusal to follow a former decision may have in disturbing vested rights being one of the most cogent reasons for adhering to precedent, there is less objection to departing from it when the decision can be so limited as to

¹ *Hans v. Louisiana*, 134 United States Reports, 1, 20.

² "Digest," 1, 3, *de legibus*, etc., 34.

have only a future operation. This is occasionally feasible. Thus the High Court of Errors and Appeals of Mississippi by an early decision held that on the dissolution of a bank all its rights and liabilities were extinguished. Thirty years later the Supreme Court of the same State overruled that decision, declaring it "condemned by reason and the principles of modern and enlightened jurisprudence," but nevertheless applied it as a controlling precedent to a case arising out of the dissolution of a bank which had been incorporated previously to the time when the original decision was made.¹

The effect of overruling a former opinion may also be limited by the dual character of our government.

The courts of the United States follow the decisions of the State courts in the determination of matters of State law. If a State law is held by the courts of the State to have a particular meaning and effect it will be accorded the same in the federal courts. But if a federal judgment is for that reason rendered in a certain form, and there is no appeal, it settles the rights of the parties to the suit forever, even should the State courts afterward reverse their former rulings as being erroneous.²

De Tocqueville, in his estimate of the American bar,³ speaks of it as devoted to investigating what has been done rather than what ought to be done; to the pursuit of precedent rather than of reason.

In a very limited sense this is true. Where codes

¹ *Bank of Mississippi v. Duncan*, 56 Mississippi Reports, 166.

² *Deposit Bank v. Frankfort*, 191 United States Reports, 499.

³ "Democracy in America," II, Chap. xvi.

are wanting, former judicial decisions must serve in their place. But it would be a mistake to suppose that it is a large part of the business of American lawyers to search out precedents for the guidance of the courts. Most cases, after any facts in dispute are once settled, depend on the application of the simplest processes of ordinary reasoning. No aid from the past is needed for this and none is to be had. It has been well said by an English judge¹ that the clearer a thing is the more difficult it is to find any express authority or any *dictum* exactly to the point. Nor, if there be one, is it to be accepted without regard to the circumstances out of which it arose or the end to be effected by the judgment. A precedent may indeed be used slavishly, but so it may be used in the free spirit in which it was conceived. Many an argument at the bar, however, is ruined by an excessive anxiety to repeat the *ipsissima verba* of some ancient opinion, when the soul of it is the only thing of value. And occasionally courts are chargeable with pursuing the letter of some of their former deliverances rather than the spirit which called them forth and gave them all their vitality.

¹ James, L. J., in 1875, Law Reports, 10 Chancery Appeal Cases, 526.

CHAPTER V

THE JUDICIAL POWER OF DEVELOPING UNWRITTEN LAW

THE English common law was and is an unwritten law. To find it one has to look in legal treatises and reports of judicial decisions. Its historical development has been not unlike that of Rome. In Rome, as in England, there were in early times written enactments or governmental declarations of standing rules on but few points. Some of these writings were of special importance, such as the twelve tables of Rome and the *Magna Charta* of England. These were regarded as so bound up with the very life of the people as to have a place by themselves, and a superior force to anything to the contrary to which the free consent of the people was not formally given. But in general Romans and Englishmen preferred to make custom their law, and to let this law grow "not with observation," but insensibly from day to day as the needs of their social organization might be found to require. It was a wise preference, and founded on a better philosophy than they knew—than the world knew, until the theory of evolution was demonstrated by Darwin and applied to governmental science by Spencer.

A customary law for a people of advancing civilization and power must expand with corresponding

rapidity. There will soon be disputes as to what it is on certain points and a demand for some authoritative information as to this. In Rome, the priests gave it at first, and then the lawyers. In England, the priests never gave it, as priests. There was no sacred college of law. Priests took part in legislation. A priest, at the king's right hand, was his spokesman in doing equity. But it was from the first the king as a judge, or the king's judges deputed by him and sitting for him, who settled controverted questions of common law. For the Roman and for the Englishman the first representatives of government who could be called judges were primarily and principally executive officers. The Roman *prætor* was not given judicial functions because he had legal attainments. The *aula regis* of early England was composed of the great officers of state. The chief justiciar, however, soon ceased to be prime minister. His associates on the bench, as law became a recognized profession, came to be chosen largely for their fitness for judicial work and to be kept at it during the king's pleasure. At Rome, on the contrary, the prætorship remained a political place, held for a fixed term, and a brief one. Information as to the unwritten law applicable to any controversy between parties had therefore to be sought from others. The lawyers could give it; and it was to them, not to the judges, that resort was had. The opinion of a great jurist was for Rome what the opinion of a judge was for England. It was commonly accepted as conclusive not only by the people but by the courts.

Such opinions profess to state what the law was

by which rights accrued out of a past transaction. In fact, they often do much more. By declaring that to be the law, and declaring it with authority, they are the first to make it certain that it is the law. The difference between this and making law is not great.

The Romans at first accorded authority to the opinions (*responsa*) of lawyers only because of the standing and reputation of those who gave them. Later the emperors gave an official character and weight to the opinions of certain lawyers of the past. The English always accorded authority to the opinions of their judges, because they spoke for the state. Americans from the first have done the same.

American judges have exercised these powers of ascertaining and developing unwritten law even more freely than English judges. They were forced to it as a result of applying the common law of one people to another people inhabiting another part of the world and living under very different social conditions. In doing this it was necessary to reject not a little of what for England had already been definitely settled and universally accepted. The legislatures of the colonies and States rejected much, but the courts rejected more. The legislatures also added much, but the courts added yet more.

Usages grow up rapidly in new settlements and along frontiers bounded by territory held by savages. Of such usages, under the rulings of the courts, many were soon crystallized into law.

New inventions and new political conceptions in the eighteenth century began to change the face of the

civilized world. The common law as to agency had to be adapted to the operations of business corporations; that as to highways to railroads; that as to contracts by mail to contracts by telegram, and later to contracts by telephone. The whole law of master and servant, which for the English people was bottomed on the relation of land-owner and serf, was to be recast. Public assemblies were to be regulated and their proceedings published with greater regard to public and less to private interest.¹ Along all these lines and many others the American courts have now for nearly three hundred years been quarrying out American law from the mine of the unwritten law of the people within their jurisdiction. It has been their natural endeavor to make each part of the new system of jurisprudence which they were gradually building up harmonious with every other and to give a certain symmetry to the whole. This has forced them to deduce rule from rule and principle from principle with a freedom for which in older countries of settled institutions there is less occasion. The process has gone on during the last fifty years with ever-increasing rapidity, and for two reasons. There have been more novel questions to meet and there has been a greater wealth of suggestion and precedent at command.

Not a little, however, of the development of our unwritten law has been and remains of a local character. This is particularly true of that of the Pacific States, both on account of climatic conditions and

¹ *Barrows v. Bell*, 7 Gray's Reports, 301; 66 American Decisions, 479.

historical antecedents.¹ Chief Justice Field of the Supreme Court of California, afterward so long a member of the Supreme Court of the United States, did both a constructive and a destructive work in shaping the jurisprudence of that State. He found it seated in a land on which certain institutions of civil law origin had been impressed for centuries and into which other institutions of common law origin had been introduced in recent years. His judicial opinions molded these into one mass, rejecting something from each and retaining something from each.² Some of the results of his creative touch have been the foundation of decisions in distant States, but most were so dependent on local circumstances and conditions as to be incapable of transplantation.

But as to all questions of general concern which can be answered from analogies drawn from the common law, the judges of each State—and it is the State judiciary on which the burden of developing unwritten law mainly rests—now find in the reported decisions of the courts of last resort in all the other States a fertile source of supply when they are looking for a rule to fit a case for which the ancient law made no direct provision. Keen intellects from the bench, aided perhaps by keener ones from the bar in forty-five different jurisdictions, are discussing the problems of the day as they appear mirrored in litigated causes. What is a new question in one State was set at rest ten years or ten days ago by a judicial

¹ *Katz v. Walkinshaw*, 141 California Reports, 116.

² Pomeroy, "Some Account of the Work of Stephen J. Field," 38, 45.

decision in another. If the decision was a just and logical deduction from accepted principles of the older law it will probably be followed everywhere. If unjust and illogical, its very faults will serve to guard other courts to better conclusions.

How far judges advance along these paths depends greatly on the character of the bar. A judge rarely initiates anything. He is apt to fall into a mistake if he does. The business which he has to do is brought before him by others. It is brought before him in the best way to throw all possible light upon it, because it is set before him from two opposite points of view by two antagonists, each strenuously endeavoring to detect a flaw in the reasoning of the other. These two men have previously given the subject in controversy much careful thought. What views neither presents are generally not worth presenting. As was said in the preceding chapter, it is only in the plainest case that a judge can properly or safely base his decision on a position not suggested at the bar or as to the soundness of which he has not asked the opinion of the counsel at the hearing.

The development of law, therefore, whether unwritten or written, is primarily the work of the lawyer. It is the adoption by the judge of what is proposed at the bar.¹

There are obvious limits to this power of developing unwritten law. The courts are not to push forward into a place more appropriate for the legislature to occupy.

Mr. Justice Holmes of the Supreme Court of the

¹ See Chap. VI, x.

United States, when Chief Justice of Massachusetts, stated with his usual elegance and force the bounds within which, as it seemed to him, judicial authority should be kept. In a common law suit against a railroad company for damages suffered by an accident on its road, the defendant had asked the trial court to order the plaintiff to submit to an examination of his person by a physician whom it named, for the purpose of determining what injuries he had really suffered. "We agree," said the Chief Justice, "that in view of the great increase of actions for personal injuries it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts in the form of deduction or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds with such consistency as he may be able to attain. . . . In the present case we perceive no such pressing need of our anticipating the legislature as to

justify our departure from what we cannot doubt is the settled tradition of the common law to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go. It will be seen that we put our decision, not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case."¹

The theory of judicial power thus stated carries implications that would not be universally accepted. It is intimated that if the necessity had seemed strong enough to call for the order asked for in the trial court it ought to have been granted, although not justified by any settled rule or authoritative precedent, nor by any clear analogy from such a rule or precedent. This is a view taken, though with less caution and qualification, in a work written by the same hand many years before, which is recognized as a legal classic on both sides of the Atlantic. In "The Common Law,"² after discussing some of the reasons which actuate judges in assuming to unfold the unwritten law, it is stated thus:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact

¹ *Stack v. New York, New Haven and Hartford Railroad Co.*, 177 Massachusetts Reports, 155; 58 Northeastern Reporter, 686.

² Pp. 35, 36.

and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. . . . The truth is that the law is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

Courts enter on a dangerous ground when, to justify their action, they rely on any rule of public policy not stated in Constitution or statute and unknown to the common law. If such was once the habit of the English courts, it was because of social conditions with which they had to deal which no longer exist either in their country or in ours. It is for the judge to adapt old principles rather than adopt new ones. What one man thinks is public policy another, equally clear-headed and well-informed, may not. The safe course for the judiciary is to rely on the legislature to declare it, so far as the common law does not. If, however, the courts of a State are called upon for the first time to declare what any rule of the common law, governing a past transaction, is, or at a given time was, in that State, and this be a doubtful question, the decision virtually calls for the making of a new rule, though under the form of applying an old one, and that will be adopted which may be deemed best calculated to do justice in cases of that particular character.¹

¹ *Seery v. Waterbury*, 82 Conn., 567, 571; 74 Atlantic Reporter, 908.

CHAPTER VI

THE JUDICIAL POWER OF INTERPRETING AND DEVELOPING WRITTEN LAW

As governments must provide some authority to declare what the unwritten law governing any transaction was, so they must provide some authority to declare what the written law governing any transaction means. Few statements of any rule or principle can be written out in such a way as to convey exactly the same impression to every mind. Thought is subtler than its expression. The meaning of written laws will therefore often be questioned.

An answer is sometimes attempted by the authority from which the law proceeded. A king declares what he intended by the terms of an ambiguous edict. A legislature passes an act to declare the meaning of a previous one. But meanwhile rights have accrued. Something has been done in reliance upon a certain construction of the law. If it was a right construction, then what was done was lawful, and no subsequent explanation of his intentions by the lawgiver can change this fact. Laws are addressed to the community at large, and their meaning must be determined once for all from the language used, however inadequate it may have been to express the real design of those who enacted them, unless that design so clearly

appears, notwithstanding an unfortunate choice of words, as to compel an interpretation against the letter but in obedience to the spirit of the enactment. A "declaratory statute"—one declaring what a previous statute meant—is therefore, if it gives it a meaning unwarranted by its terms when so interpreted, only effectual as respects future transactions. As to the past, the meaning is for the courts, and while such a statute may aid, it cannot control them.

Are the courts to send such questions to a jury or shall the judges decide them? The answer must be determined by considerations applicable to every sort of written paper. If the true construction of an ambiguous document be left to juries, it is evident that there would be no certainty that different results would not be reached in different cases, and probable that unanimity would seldom be attainable. If left to judges, a decision will certainly be reached and, it may be presumed, be reasoned out with care, while if the matter be one of public importance the grounds on which they proceed will be so expressed as to furnish a guide to others toward the same conclusion. The construction of all writings is therefore, by the Anglo-American common law, as by the judicial system of most countries, deemed, in case of a question affecting litigated rights, to belong of right to the judges. Their possession of this power in the United States is especially necessary in respect to written law.

In every government there must be some human voice speaking with supreme authority. It may be that of one man or of many men. The essential thing is that it should be a personal utterance, proceeding

from persons to whom, by acknowledged law or custom, submission is due, and one that, if need be, can be enforced by the whole power of the State.

The fundamental principle of American government, as laid down in the words of Harrington in the oldest of our State Constitutions, after which many of the rest, and that of the United States as well, have been largely patterned, is that it is one of "laws and not of men."¹ Laws, however, must be administered by men. Their meaning, if it be uncertain, must be determined by men. It must be the subject, as the same Constitution twice affirms, of "impartial interpretation."² This interpretation is really what gives them force. It is the personal utterance of one speaking for the State, and who speaks the last word. It was simply following English precedent to give this power to the courts as respects legislative enactments. But the principle which required it inevitably extended with equal force to constitutional provisions. The people who adopt written constitutions for their government put their work in a form which must often give rise to questions as to what they intended to express. They rely on the judiciary to secure their enforcement, and the judiciary must enforce them according to what it understands their meaning to be.]

There is but a step from interpretation to enlargement. Every statute is passed to accomplish something. If the object is clear, the rules of Anglo-

¹ Constitution of Massachusetts, Part the First, Art. XXX, quoted more fully in Chapter II.

² *Id.*, Preamble, and Part the First, Art. XXIX.

American law allow the court that may be called on to apply it to extend its operation to cases within the purpose evidently intended, although the language used is inadequate fully to express it. This is styled giving effect to "the equity of the statute." Even violence can be done to the words, if so only can this judge-discovered intent be made effectual. The rules governing judicial interpretation of statute law fill a good-sized volume.

As the Roman lawyers worked out by force of logic and analogy an extensive system of private law from the meagre fabric of the Twelve Tables, so under the lead of American lawyers American judges have applied the processes familiar in the development of unwritten law to the development of our written law, both statutory and constitutional.

Carlyle said that the Roman republic was allowed so long a day because on emergencies the constitution was suspended by a dictatorship. The American republics have a right, upon this theory, to a still longer one. With them the Constitution need not be temporarily set aside on an emergency. It may simply be permanently enlarged or limited by judicial construction. A Constitution is the garment which a nation wears. Whether written or unwritten, it must grow with its growth. As Mr. Bryce has put it: "Human affairs being what they are, there must be a loophole for expansion or extension in some part of every scheme of government; and if the Constitution is Rigid, Flexibility must be supplied from the minds of the Judges."¹

¹ "Studies in History and Jurisprudence," 197.

[] The Constitution of the United States declares that no State shall pass any law impairing the obligation of contracts. This proposition being the major premise, Chief Justice Marshall added the minor premise that every charter of a private corporation is a contract, and completed the syllogism by the conclusion that no State can pass any law impairing the obligation of such charters. The counsel who opposed this doctrine urged that every one must acknowledge that neither the men who framed the Constitution nor the people who adopted it ever thought that the word "contracts," as so used, embraced "charters." Be it so, was Marshall's answer, that proves nothing unless you can go farther and satisfy the court that if they had contemplated the construction we put upon it they would have used words to exclude it.¹

The acquisition of foreign territory is a matter not especially provided for in the Constitution of the United States. Jefferson hesitated to make the Louisiana purchase on this account, and was quite inclined to think, when he did make it, that he had transcended the bounds of his authority. The courts gave the Constitution a different interpretation, and stamped this upon it as permanently as if it had been a birthmark. It was done by Marshall in a single sentence. "The Constitution," he observed, "confers absolutely on the government of the Union the powers of making war and of making treaties: consequently that government possesses the power of acquiring territory either by conquest or by treaty."²

¹ *Dartmouth College v. Woodward*, 4 Wheaton's Reports, 518.

² *American Insurance Co. v. Canter*, 1 Peters' Reports, 511, 542.

In the course of the same opinion, the great Chief Justice led the way toward the doctrine, to be developed later, that the manner in which such territory was to be held and its inhabitants governed need not be such as the Constitution prescribed for the territory within one of the United States. It was to be prescribed by Congress under its power "to make all needful rules and regulations respecting the territory or other property belonging to the United States." Congress had set up a Legislative Council in the Territory of Florida, and the Legislative Council had established a court of admiralty, with judges holding office for four years. The case in hand turned upon the effect of a judgment of that court. It was contended at the bar that it had no effect, because by the express terms of the Constitution the judicial power of the United States extended to all cases of admiralty jurisdiction, and must be vested in one Supreme Court and such inferior courts as Congress might ordain. "We have only," was Marshall's reply, "to pursue this subject one step further to perceive that this provision of the Constitution does not apply to it. The next sentence declares that 'the judges both of the Supreme and inferior courts shall hold their offices during good behaviour.' The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in

virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those Courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a State government.’’¹

It will be perceived that the argument here was that the Florida court did not exercise any of the judicial power of the United States because it could not, and that it could not because the judges were not commissioned for life. This left unanswered the deeper question whether any act of Congress could serve to support a court existing under authority of the United States, the judges of which were to hold office only for a term of years. It was assumed that the provision for a life tenure did not apply to the Florida judges, because if it did the court would be illegally constituted. Whether it was legally or illegally constituted was not discussed, except for the general reference to the power of Congress to legislate for the territories and exercise the rights of sover-

¹American Insurance Co. v. Canter, 1 Peters’ Reports, 511, 546.

eignty over territory newly acquired by contest or treaty.

On this decision has been built up our present system of governing territorial dependencies at the will of Congress.¹]

Marshall's was the last appointment made to the Supreme bench from the Federalist party. It was not many years before that party disappeared from the face of the earth. Jefferson put three men there representing the other school of political doctrine,² and his appointments were followed by others of a similar nature, until in 1830, after Mr. Justice Baldwin had taken his seat, it became evident that the nationalizing tendencies which the great Chief Justice from the beginning of the century had impressed upon its opinions were likely soon to cease. He apprehended himself that the court would come to decline jurisdiction in the cases ordinarily presented over writs of error to reverse the judgments of State courts.³ In the following year he thought seriously of resigning. He disliked, he wrote to Mr. Justice Story, to leave him

¹ *Mormon Church v. United States*, 136 United States Reports, 1, 43; *Dorr vs. United States*, 195 United States Reports, 138, 141.

² Among Jefferson's papers is a description of five men whom he especially considered with reference to filling the first vacancy which occurred during his administration. Politics figures largely in the sketch of each. As to William Johnson, whom he selected, it is noted that he is of "republican convictions and of good nerves in his political principles." *American Historical Review*, III, 282.

³ *Proceedings Massachusetts Historical Society*, 2d Series, XIV, 342.

almost alone to represent the old school of thought, but he adds, "the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant."¹

The next Chief Justice, while far from being of Marshall's school, was not one to attempt to overthrow what he had done. In *Ableman v. Booth*,² he insisted on the supremacy of the courts of the United States over those of the States with the utmost firmness, and defended the doctrine on principle with force and ability. The Supreme Court, however, under Taney, was not looked on with much favor by the survivors of the old Federalists. "I do not," wrote Chancellor Kent in 1845 to Justice Story, "regard their decisions (yours always excepted) with much reverence, and for a number of the associates I feel habitual scorn and contempt."³

Our State constitutions generally guarantee the citizen against deprivation of his rights without "due process of law" or "due course of law." A similar provision was made for the United States by the fifth amendment to their Constitution, and since 1868 the fourteenth amendment has established the same rule inflexibly for every State. What is due process of law? It is for the courts to say, and while they have cautiously refrained from assuming to give any pre-

¹ Proceedings Massachusetts Historical Society, 2d Series, XIV, 347.

² 21 Howard's Reports, 506.

³ Proceedings of the Massachusetts Historical Society, 2d Series, XIV, 420.

cise and exhaustive definition, they have, in many instances, enforced the guaranty at the cost of declaring some statute which they held incompatible with it to be no law. They have also, and much more frequently, supported some act of government claimed to contravene it, and which, according to the ancient common law of England, would contravene it, because in their opinion this ancient law had been outgrown.

Sir Edward Coke, whom no expounder of the English common law outranks in authority, in his "Institutes," in treating of *Magna Charta*, referred to the phrase *per legem terræ* as equivalent to "by the law of the land (that is, to speak it once for all) by the due course and process of law." It is incontestable that due course and process of law in England at the time when the American colonies were planted was understood to require the action of a grand jury before any one could be put on trial for a felony. Some of our States have abolished grand juries in whole or part. To review a capital sentence for murder in one of these States, a writ of error was prayed out from the Supreme Court of the United States in 1883. The constitutionality of the State law was sustained. In disposing of the case the court did not controvert the position that by the English common law no man could be tried for murder unless on a presentment or indictment proceeding from a grand jury. But, said the opinion, while that is due process of law which had the sanction of settled usage, both in England and in this country, at the time when our early American constitutions were adopted in the eighteenth century, it by no means

follows that nothing else can be. To hold that every feature of such procedure "is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. . . . It is most consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."¹

Many of our State Constitutions specify certain rights as inherent and indefeasible, and among them that "of acquiring, possessing, and protecting property." What is property? American courts have said that it includes the right of every one to work for others at such wages as he may choose to accept. One of them, in supporting a decree for an injunction against combined action by a labor union to deprive non-union men of a chance to work, by force or intimi-

¹ *Hurtado v. California*, 110 United States Reports, 513, 528, 529, 530, 537.

dation, notwithstanding a statute abrogating the common law rule making such acts a criminal conspiracy, has put it thus:

The right to the free use of his hands is the workman's property, as much as the rich man's right to the undisturbed income from his factory, houses, and lands. By his work he earns present subsistence for himself and family. His savings may result in accumulations which will make him as rich in houses and lands as his employer. This right of acquiring property is an inherent, indefeasible right of the workman. To exercise it, he must have the unrestricted privilege of working for such employer as he chooses, at such wages as he chooses to accept. This is one of the rights guaranteed to him by our Declaration of Rights. It is a right of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect. The one most concerned in jealously maintaining this freedom is the workman himself.¹

But, as already suggested in the preceding chapter, the judges whose opinions have vitalized and enlarged our written law by reading into it some new meaning or application have but echoed the voice of the bar.

The greatest achievements of Marshall in this direction were really but a statement of his approbation of positions laid down before him by Daniel Webster. In the early stages of the Dartmouth College case, when it was before the State courts in New Hampshire, it was Webster and his associates, Jeremiah Mason and Jeremiah Smith, both lawyers of the highest rank, who first put forward the doctrine that the charter of a private corporation was a contract; and

¹ *Erdman v. Mitchell*, 207 Pennsylvania State Reports, 79; 56 Atlantic Reporter, 331.

when the cause came before the Supreme Court of the United States it fell to the lot of Webster to bring it to the attention of the great Chief Justice.¹ So in the Florida case it was he, in supporting the cause of the prevailing party, who suggested that the Territory of Florida, though owned by the United States, was no part of them. "By the law of England," he went on to say, "when possession is taken of territories, the king, *Jure Coronæ*, has the power of legislation until parliament shall interfere. Congress have the *Jus Coronæ* in this case, and Florida was to be governed by Congress as she thought proper."²

This argument did not spend its force in its effect on Marshall. When, after the lapse of two generations, greater problems of the relations of the United States to territory newly acquired from Spain arose, it was, as has been said above, made one of the cornerstones of the opinion of the same court which determined what they were.³

So in the *Hurtado* case, which has been described at length, no description of due process of law was found better and none is better than that given by Webster so many years before in the *Dartmouth College* case. The Supreme Court of New Hampshire, from whose judgment that cause came up by writ of error, had held—and on that point its decision was final—that the change in the college charter was no violation of the bill of rights embodied in the Con-

¹ "Works of Daniel Webster," V, 497.

² *American Insurance Co. v. Canter*, 1 Peters' Reports, 511, 538.

³ *Downes v. Bidwell*, 182 United States Reports, 244, 265.

stitution of that state. This, following *Magna Charta*, provided (Part I, Art. 15) that no subject should be "despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." *Magna Charta* was wrung from a tyrant king. So, said the State court, this article was inserted to protect the citizens against the abuse of the executive power. When it speaks of the law of the land it means the law of New Hampshire, and that is whatever the legislature of New Hampshire chooses to enact, so long as it contravenes no other constitutional provision.

Webster, in paving the way toward his claim that the charter was a contract, and, as a vested right of property, inviolable by a State, alluded to the sacredness of all rights under the guaranties to be found in our American system of constitutional government. It was not surprising that the Constitution of the United States should protect them in the way he asserted. All the States, and New Hampshire among them, had done the same in placing the great features of *Magna Charta* in their bills of rights. What, he asked, was this law of the land by which all things were to be tried and judged? This was his answer: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass

under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land."¹

In the opinion by Mr. Justice Mathews in *Hurtado v. California* he observes: "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"²

Other instances might be mentioned, equally conspicuous, which will entitle Webster to the name given him by his contemporaries of "the expounder of the Constitution."³ No one American lawyer has done as much in that direction, but there are few of the greater ones who have not done something. As, however, the glory of a battle won is for the commander

¹ "Works of Daniel Webster," V, 486.

² *Hurtado v. California*, 110 United States Reports, 516, 535.

³ See Article by Everett P. Wheeler on Constitutional Law of the United States as Moulded by Daniel Webster, in *Yale Law Journal*, Vol. XIII, p. 366, and in the 27th Annual Report of the New York State Bar Association.

of the victorious forces, so the glory of adding a new meaning to a constitution at a vital point is, with the public, always for the judge whose opinion is the first to announce it. Who announced it to him they never know or soon forget.

The acknowledged possession by the judiciary of the power to interpret written law, and thus to delimit its effect, has led to a serious abuse in our methods of legislation. Statutes are often favorably reported and enacted, both in Congress and the State legislatures, which are admitted to be either of doubtful constitutionality or to contain expressions of doubtful meaning, on the plea that those are questions for the courts to settle. This has been aptly termed the method of the "*referendum* to the courts in legislation."¹ It is unfair to them, so far as any question of the Constitution is concerned, since as soon as the measure is enacted a presumption arises that it is not unconstitutional. The courts will not hold otherwise without strong grounds. It comes to them with the benefit of a full legislative endorsement. It is unfair to the people, both as to questions of constitutionality and of interpretation. A statute can be so drawn as to need no interpretation, or none the outcome of which can be a matter of doubt to any competent lawyer. A legislature abandons its function when it enacts what it does not understand.

The Sherman Anti-Trust Act is an instance of legislation of this character. It forbids contracts "in restraint of trade or commerce" between the States.

¹ Thomas Thacher, Address before the State Bar Association of New Jersey, 1903.

When the bill was reported it was objected in the House of Representatives that these terms were vague and uncertain. The chairman of the committee himself stated that just what contracts will be in restraint of such commerce would not and could not be known until the courts had construed and interpreted the phrase.

The real intent of those who inserted it was that it should not embrace contracts which were reasonable and not contrary to public policy. A similar term in the English Railway and Canals Traffic Act had received that interpretation in the English courts, and they supposed that our courts would follow those precedents.¹ The Supreme Court of the United States did construe it as embracing all contracts in restraint of inter-state trade, whether reasonable or unreasonable, fair or unfair.² One of the justices who concurred in that opinion, in a subsequent case arising under the same statute intimated that on reconsideration he thought the view that had been thus adopted was wrong.³ The addition by those who drafted the bill of three or four words to make their intended meaning clear would have avoided a result unexpected by them and probably undesired, and relieved the court from deciding questions of doubtful construction involving important political considerations and immense pecuniary interests.

¹ George F. Hoar, "Autobiography," II, 364.

² *United States v. Joint Traffic Association*, 171 United States Reports, 505, 570.

³ *Northern Securities Co. v. United States*, 193 United States Reports, 197, 361.

CHAPTER VII

THE JUDICIAL POWER OF DECLARING WHAT HAS THE FORM OF LAW NOT TO BE LAW

GOVERNMENT is a device for applying the power of all to secure the rights of each. Any government is good in which they are thus effectually secured. That government is best in which they are so secured with the least show of force. It is not too much to say that this result has been worked out in practice most effectually by the American judiciary through its mode of enforcing written constitutions. How far it has gone in developing their meaning and building upon the foundations which they furnish has been made the subject of discussion in the preceding chapter. It remains to consider its office of adjudging statutes which come in conflict with their meaning, as thus determined, to be void.

The idea of a supreme authority exercising the function of setting aside acts of legislative bodies which it deemed inconsistent with a higher law was familiar to Americans from an early period of our colonial history.¹ The charter of each colony served the office of a constitution. The Lords of Trade and Plantations exercised the power of enforcing its observance. They did in effect what, as the colonies

¹ See Chap. I; Dicey, "Law of the Constitution," 152; "Two Centuries Growth of American Law," 12, 19.

passed into independent States with written Constitutions, naturally became the function of their own courts of last resort. The Constitution, like the charter, was the supreme law of the land. Whatever statutes the legislature of a State might pass, it passed as the constitutional representative of the people of that State. It was not made their plenary representative. Every Constitution contained some provisions restricting the legislative power. If any particular legislative action transgressed these restrictions, it necessarily went beyond the authority of the body from which it emanated.

The Judicial Committee of the Privy Council, which now exercises the functions formerly belonging to the Lords of Trade and Plantations, and is in fact the same body, deals in a similar way to-day with questions of a constitutional character. If one of the provinces included in the Dominion of Canada should in its local legislation infringe upon a field belonging to the Dominion Parliament, this committee can "humbly advise the king" that the act in question is for that reason void.¹

The Revolution found the new-made States of the Union without this safeguard against a statute repugnant to a higher law. They had enjoyed as colonies the advantage which Burke declared was an ideal in government. "The supreme authority," he said, "ought to make its judicature, as it were, something exterior to the State." The supreme judicature for

¹ In July, 1903, for instance, an Act of the Province of Ontario, entitled the "Lord's Day Profanation Act," was thus declared *ultra vires*.

America had been in England. There was now no King in Council with power to set a statute aside forthwith by an executive order. But the other function of the King in Council, that of acting as a court of appeal from colonial judgments, had been simply transferred to new hands. The State into which the colony had been converted now exercised it for itself and through her judiciary.

The judgment of a court is the legal conclusion from certain facts. Unless it is a legal conclusion from the facts on which it purports to rest it is erroneous, and, if there is any higher court of appeal, can be reversed. If such a judgment depends upon a statute which justifies or forbids the act or omission which constituted the cause of action, it is legal or illegal according as this statute is or is not law. It cannot be law if its provisions contravene rules laid down by the Constitution of the State to restrict the legislative power. The court which tries the cause must meet this question whenever it arises like any other and decide it. A court of law must be governed by law. What has the form of law is not law, in a country governed by a written constitution, unless it is consistent with all which that instrument provides.

The first decision of an American court bottomed on these principles was probably rendered as early as 1780, and in New Jersey.¹ One of her greatest statesmen, who after taking a distinguished part in framing the federal Constitution became a justice of the Supreme Court of the United States, vigorously enforced the same doctrine on the circuit fifteen years

¹ *Holmes v. Walton*, IV *American Historical Review*, 456.

later in trying a cause turning on the unconstitutionality of a confirming act passed by the legislature of Pennsylvania. "I take it," Justice Patterson said in charging the jury, "to be a clear position that if a legislative act oppugns a constitutional principle the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound that in such case it will be the duty of the court to adhere to the Constitution, and to declare the act null and void."¹

The accession of the Republicans to power in 1801, only to find the courts of the country controlled by judges appointed from the ranks of the Federalists, was the occasion of new attacks upon the doctrine thus laid down. It was vigorously denied by Senator Breckenridge of Kentucky, afterward Attorney-General of the United States, in the debates preceding the repeal of the Judiciary Act of 1801.² A year later (in 1803) the question came for the first time before the Supreme Court of the United States, and the same positions advanced by Patterson were taken in what is known as the leading case upon this subject by Chief Justice Marshall.³ It was unfortunate that the action was one involving a matter of practical politics, in which the plaintiff sought the benefit of a commission the issue of which had been directed by President Adams at the close of his term, but which was withheld

¹ *Vanhorne's Lessee v. Dorrance*, 2 Dallas' Reports, 304, 309, 316.

² Elliot's Debates, IV, 444.

³ *Marbury v. Madison*, 1 Cranch's Reports, 137. See Willoughby, "The American Constitutional System," 39.

by the Secretary of State under President Jefferson. Party feeling ran high at this time. The views of Breckenridge were shared by many, and the supremacy of the judicial department, which this prerogative, if it possessed it, seemed to imply, was distasteful to a large part of the people.

An eminent judge of a State court, Chief Justice Gibson of Pennsylvania, as late as 1825, in a dissenting opinion, combated at length the reasoning of Marshall as weak and inconclusive. If, he said, the judiciary had the power claimed, it would be a political power. Our judicial system was patterned after that of England. Our judges had, as such, no power not given by the common law. It was conceded that English judges could not hold an act of Parliament void because it departed from the British constitution. No more could American judges hold an act of a State legislature void because it departed from the State Constitution, unless that Constitution in plain terms gave them such a power. The Constitution of the United States did give it, political though it was, to all judges (Art. XI, Sec. 2), and a State statute which was contrary to that Constitution might therefore properly be declared void by the courts.¹ Later in his judicial career Gibson abandoned this position,² and the ground taken by Marshall has been since 1845 universally accepted.

The last official attack upon it was made in 1831, at the time when the feeling against protective tariffs was strong in the South, and South Carolina was

¹ *Eakin v. Raub*, 12 Sergeant and Rawle's Reports, 330.

² *Norris v. Clymer*, 2 Pennsylvania State Reports, 281.

known to be meditating opposition to their enforcement. The judiciary committee of the House of Representatives reported a bill to repeal the section of the Judiciary Act which gave the Supreme Court of the United States the right to reverse judgments of State courts that it might deem contrary to the Constitution of the United States. The report said that such a grant was unwarranted by the Constitution and "a much greater outrage upon the fundamental principles of theoretical and practical liberty as established here than the odious writ of *quo warranto* as it was used in England by a tyrannical king to destroy the right of corporations." The House, however, rejected the bill by a very large majority.

A proper regard for the co-ordination of the departments of government forbids courts to declare that a statute is inconsistent with the Constitution unless the inconsistency is plain. It has been judicially asserted that it must be plain beyond a reasonable doubt, thus applying a rule of evidence which governs the disposition of a criminal cause. As judgments declaring a statute inconsistent are often rendered by a divided court, this position seems practically untenable. The majority must concede that there is a reasonable doubt whether the statute may not be consistent with the Constitution, since some of their associates either must have such a doubt, or go further and hold that there is no inconsistency between the two documents.

This right of a court to set itself up against a legislature, and of a court of one sovereign to set itself up against the legislature of another sovereign, is

something which no other country in the world would tolerate. It rests on solid reason, but as the Duc de Noailles has said, "Un semblable raisonnement ne ferait pas fortune auprès des républicains d'Europe, fort chatouilleux sur le chapitre de la puissance législative. C'est que la notion de l'État diffère d'une façon essentielle sur les deux rives de l'Atlantique."¹

Our people have been satisfied with the interposition of the courts to defend their Constitutions from executive or legislative attack, because these Constitutions stand for something in which they thoroughly believe. President Hadley has well said that "a written Constitution serves much the same purpose in public law which a fence serves in the definition and protection of private rights to real estate. A fence does not make a boundary; it marks one. If it is set where a boundary line has previously existed by tradition and agreement, it forms an exceedingly convenient means of defending it against encroachments. If it is set near the boundary and allowed to stay there unchallenged, it may in time become itself the accepted boundary. But if the attempt is made to establish a factitious boundary by the mere act of setting up a fence the effort fails."² Americans took principles and institutions with which they had become familiar in colonial days and made their Constitutions out of them. Their attachment to what the Constitution provides goes behind the Constitution to the rock of ancient custom and precedent on which it rests, the common heritage of all the States.

¹ Cent Ans de République aux États-Unis, II, 145.

² Freedom and Responsibility, 30.

There is an obvious reason for the unwillingness of the judiciary to exercise the power under consideration unless in case of necessity. The legislature presumably does only what the public sentiment of the day justifies or demands. One branch of it, at least, is the direct representative of the people. To defeat the operation of a statute is therefore always presumably an unpopular thing to do, and if in any case there is known to be truth behind the presumption, it requires, as the Federalist¹ put it, "an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution."

It is seldom that an inferior court declares a statute void. The mere fact that it was enacted by the legislature imports the opinion of that body that it was within its powers; and such an opinion of a department of government is entitled to great respect. If a different opinion is to prevail, it should ordinarily be first pronounced by the highest authority that can speak for the judicial department. So far, however, as the question of power or jurisdiction is concerned, a justice of the peace, in trying a five-dollar case, has the same authority to disregard a statute, whether it be one enacted by the State legislature or by Congress, if he deems it unconstitutional, which belongs to the full bench of the Supreme Court of the United States. If he is wrong, the only remedy is by appeal.

The number of statutes which have been judicially pronounced in whole or part invalid in the United States is very large. Among the Acts of Congress

¹ No. LXXVIII.

which have fallen in this manner and have been made the subject of elaborate opinions may be mentioned the provision in the original Judiciary Act giving the Supreme Court of the United States greater original jurisdiction than the Constitution provided;¹ the Act of 1865, excluding from practice in the United States courts attorneys who could not take the "iron-clad oath" that they had not supported the South in the Civil War;² the Legal Tender Act of 1866;³ the Act of 1870, to protect the colored voter;⁴ the Civil Rights Act of 1875;⁵ the Trade Mark Act of 1876,⁶ and the Income Tax Act of 1894.⁷ Fifteen others of less importance have fallen by the same sword. The Supreme Court of the United States has also set aside in the same manner, as inconsistent with the Constitution of the United States, over two hundred statutes passed by States. Of the twenty-one acts of Congress thus declared unconstitutional, the decisions as to all but two were rendered after 1830; of the State statutes all but twenty-six.⁸ The fourteenth amendment has added largely to the list of the latter since its adoption in 1868.

¹ *Marbury v. Madison*, 1 Cranch's Reports, 137.

² *Ex parte Garland*, 4 Wallace's Reports, 333.

³ *Hepburn v. Griswold*, 8 Wallace's Reports, 603, overruled in the *Legal Tender Cases*, 12 Wallace's Reports, 457.

⁴ *United States v. Reese*, 92 U. S. Reports, 214.

⁵ *United States v. Stanley*, 109 U. S. Reports, 3.

⁶ *The Trade Mark Cases*, 100 U. S. Reports, 82.

⁷ *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. Reports, 429.

⁸ 2 Condensed Reports Supreme Court (Peters' Ed.), 325, note a; see also 131 U. S. Reports, ccxxxv.

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State statutes set aside by the State courts since 1780 as in violation of their respective State constitutions number thousands. In the year from October 1, 1902, to October 1, 1903, the legislatures of forty-four States and fully organized Territories of the United States were in session and nearly 14,400 new statutes were enacted. During the same year fifty State statutes were declared in whole or part unconstitutional by courts of last resort. Three of these decisions were rendered by the Supreme Court of the United States. Five statutes of Missouri and as many of Indiana were thus set aside; three each of California, Kansas and Ohio; two each of Florida, Illinois, Mississippi, Montana, Nebraska, New York, Oregon and Wisconsin, and one each of those of Kentucky, Maine, Michigan, Minnesota, New Jersey, Georgia, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington and West Virginia.¹ On the average probably as many as one statute out of every three hundred that are enacted from year to year are thus judicially annulled.

The declaration by a court that a statute is unconstitutional and void is only a step in a cause. In the judgment it may not be found necessary or proper even to allude to it. But the order of the court which the judgment contains must be executed precisely as if no such statute had ever been enacted. It may, in effect, be directed against the State whose statute is pronounced void if the plaintiff complains of action taken under it which has deprived him of property

¹ Bulletin No. 86, New York State Library, "Comparative Summary and Index of Legislation, 1903," 273, 281.

and put it in the hands of public officers, or seeks a remedy to prevent a threatened wrong.

The State of Ohio in 1819 passed a statute reciting that a branch of the United States Bank was transacting business there contrary to the law of the State, and imposing a tax upon it, in case it continued to do so, of \$50,000 a year, to be collected by the auditor and paid over to the treasurer. The auditor subsequently sent a man to the bank who forcibly seized and carried off \$98,000 in specie. This was given to the State treasurer, who kept it in the treasury in a trunk by itself. The bank sued all three for the money in the Circuit Court, setting forth all these proceedings at length. Judgment went against them and, with a slight modification, was affirmed by the Supreme Court of the United States. It was held by Marshall in giving the opinion that the statute was void; that the money had never become mingled with the funds of the State; and that they were liable for it precisely as if they were private individuals who had wrongfully seized it.¹

These proceedings awakened great feeling in Ohio, and became the subject of much criticism throughout the country by those adhering to the Democratic party. The legislature of Ohio adopted resolutions denouncing them as unauthorized by the Constitution of the United States, and directed the Governor to forward a copy to the legislature of every other State with a request for its opinion on the subject. The replies varied in tone according to the political predi-

¹ *Osborn v. Bank of the United States*, 9 Wheaton's Reports, 738.

lections of the party then in control of the State addressed.

Still closer does a court come to collision with the political sovereignty of the State when it commands a public officer to do something in violation of a statute which it pronounces void, or not to do something which such a statute requires. A striking instance of this is furnished by the power to nullify legislative gerrymanders. The Constitutions of almost every State provide that it shall be districted from time to time by the legislature for the purpose of electing certain officers or local representatives, and that this shall be so done as to make the districts as nearly equal in population as conveniently may be, and composed of contiguous territory. If a legislature undertakes to construct districts by any other rule, the courts can compel those charged with the conduct of elections to disregard it and to hold them according to the districts previously established under the former law.¹ But however necessary may be the conclusion from the premises, it can hardly be agreeable to the authors of a law which it serves to destroy. In effect, though not in theory, it subordinates one department of government to another. The practical result is to give the judiciary a superior power to the legislature in determining what laws the latter can

¹ *State v. Cunningham*, 83 Wis., 90; 53 Northwestern Reporter, 35; 17 Lawyers' Reports Annotated, 145; 35 American State Reports, 29; *Board of Supervisors v. Blacker*, 92 Michigan Reports, 638; 52 Northwestern Reporter, 951; 16 Lawyers' Reports Annotated, 432 *Brooks v. State* 162 Indiana Reports; 70 Northeastern Reporter, 980.

enact. It is not a right of veto, but in a case which calls for its exercise it is an equal right exercised in a different way.

In the first instance of a resort to it¹ the section of the New Jersey Constitution of 1776 confirming the right of trial by jury was held by the full bench of the Supreme Court to render a statute void which authorized a trial without appeal before a jury of six, on a proceeding for the forfeiture of goods brought in from British territory or the British military lines. This was an unwelcome decision to many who were interested in such seizures, and they sent in several petitions to the legislature for redress. No action criticising the judges, however, was taken by that body.

Four years later the Mayor's Court of New York, in the case of *Rutgers v. Waddington*, held that an act of the legislature of that State, if given the effect which it was plainly intended to secure, would be contrary to the Constitution of the State, and therefore allowed it so limited an operation as virtually to annul it. The legislature retorted by resolutions of censure.²

What was probably the second instance of the actual use of the power in question arose in 1786, out of a statute of Rhode Island passed to support the credit of her paper money of that year's issue. Any one declining to receive it in payment for goods sold at par was to be liable to a *qui tam* action, to be tried without a jury. Counsel for a man sued in such a proceeding put in a plea that the act was unconstitutional

¹ See p. 100.

² Hunt, "Life of Edward Livingston," 49-51.

and so void.¹ The court, which was composed of five judges, threw out the action on this ground, treating the charter from Charles II and the long usage under it as having established trial by jury as a fundamental and indefeasible right. The General Assembly shortly afterward summoned the judges before it to account for this judgment. They appeared and stated their reasons for their conclusion, protesting also against the adoption of any resolution for their removal from office (which had been suggested) until after a formal trial. They were not impeached, but at the ensuing session, their terms of office having expired, the Assembly chose others in their place.

Not far from the same time the Supreme Judicial Court of Massachusetts pronounced a statute unconstitutional, but there the legislature displayed no feeling, and at the next session unanimously repealed it.²

In 1808, Judge Calvin Pease of the Ohio Circuit Court was impeached for holding a law of Ohio unconstitutional. He avowed the act, and insisted that as it was a judicial one the soundness or unsoundness of his conclusions could not be inquired into as a ground of impeachment. The result was an acquittal.³

Georgia was the only one of the original States which set up no Supreme Court at the beginning of its

¹ *Trevett v. Weeden*. See Coxe, "Judicial Power and Unconstitutional Legislation," 234, 237.

² This, no doubt, was one of the instances of the exercise of this power referred to by Elbridge Gerry in the Federal Convention of 1787. Elliot's Debates, V, 151. It is described in *Proceedings Massachusetts Historical Society*, XVII, 507.

³ Foster, "Commentaries on the Constitution of the United States," I, 691.

statehood. Her Constitution established (Art. III, Sec. 1) a Superior Court, and left it to the General Assembly to give it, if they thought best, appellate jurisdiction. The judges were subsequently by statute authorized to sit *in banc* and hear appeals. In 1815, while so sitting, they declared a certain statute of the State unconstitutional and void. The legislature showed its resentment by a set of resolutions, of which the parts material in this connection read thus:

Whereas, John McPherson Berrien, Robert Walker, Young Gresham and Stephen W. Harris, judges of the Superior Court, did, on the 13th day of January, 1815, assemble themselves together in the city of Augusta, pretending to be in legal convention, and assuming to themselves . . . the power to determine on the constitutionality of laws passed by the general assembly, and did declare certain acts of the legislature to be unconstitutional and void; and . . . the extraordinary power of determining upon the constitutionality of acts of the state legislature, if yielded by the general assembly whilst it is not given by the constitution or laws of the state, would be an abandonment of the dearest rights and liberties of the people, which we, their representatives, are bound to guard and protect inviolate;

Be it therefore resolved, That the members of this general assembly view, with deep concern and regret, the aforesaid conduct of the said judges . . . and they can not refrain from an expression of their entire disapprobation of the power assumed by them of determining upon the constitutionality of laws regularly passed by the general assembly, as prescribed by the constitution of this state; we do, therefore, solemnly declare and protest against the aforesaid assumption of powers, as exercised by the said judges, and we do, with heartfelt sensibility, deprecate the serious and distressing consequences which followed such decision; yet we forbear to look with severity on the past, in consequence of judicial precedents, calculated in some measure to extenuate the conduct of

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the judges, and hope that for the future this explicit expression of public opinion will be obeyed.

In 1821 a case was argued before the Supreme Court of the United States involving the validity of a Kentucky statute passed to protect occupants of land who had made valuable improvements upon it in good faith, in case it should be subsequently proved to belong to some one else. The occupant had employed no lawyer, and it was surmised that the court would decide against him. The Governor of Kentucky called the attention of the legislature to this, and advised the employment of counsel to defend the law. The legislature responded by resolving "that they consider an adjudication, that the laws in question are void, incompatible with the constitutional powers of this state, and highly injurious to the best interests of the people; and therefore do, in the name of the commonwealth of Kentucky, and the good people thereof, solemnly remonstrate and protest against any such adjudication," but that two commissioners should be appointed "to attend the Supreme Court of the United States at the next term and oppose any decision that may be attempted to be procured from the Supreme Court, that those laws are void in such manner as they may deem most respectful to the court and most consistent with the dignity of this state."¹ The case had already been heard *ex parte*, and the court soon proceeded to give judgment that the statute in question was void. The Kentucky commissioners employed counsel, who moved for a reargument, and

¹Niles' Register, XXI, 190, 404, 405.

obtained one, but with the same result.¹ The legislature at its next session discussed the opinion in the case and resolved "that they do most solemnly protest against the doctrines promulgated in that decision as ruinous in their practical effects to the good people of this commonwealth and subversive of their dearest and most valuable political rights."²

They then took up two decisions of their own Court of Appeals, declaring other statutes of the State unconstitutional and void, and resolved "that in the opinion of this legislature the decision of the Court of Appeals of Kentucky in the cases of Blair against Williams³ and Lapsley against Brashears⁴ are erroneous, and the laws declared therein to be unconstitutional are, in the opinion of this present General Assembly, constitutional and valid acts."⁵ The next step was to endeavor to remove the judges, but the two-thirds vote required by the Constitution to support an address to the Governor for that purpose could not be secured. At the next session, in 1824, the judges were summoned to show cause why they should not be removed. They defended their conclusions so well that the two-thirds vote of each house required by the Constitution could not be obtained. By a majority vote the court was then abolished, a new one set up by the same name, and four new judges appointed. The old court refused to recognize the validity of their proceedings.

¹ Green v. Biddle, 8 Wheaton's Reports, 1.

² Niles' Register, XXV, 275.

³ 4 Littell's Kentucky Reports, 34.

⁴ *Ibid.*, 47.

⁵ Niles' Register, XXV, 275.

The new one assumed to organize and to do business. At the next election the question which court ought to be recognized was the dominant one. The result was that the friends of the old court gained control of the House and those of the new court that of the Senate, one of them being also chosen as the Governor. The new court now got possession of most of the papers of the old court. The latter ordered their sergeant to bring them back. The Governor made preparations to use military force to resist the execution of this order. At last, in 1826, an act was passed (Session Laws, p. 13) over the Governor's veto, declaring the acts abolishing the old court unconstitutional and void. The Governor thereupon appointed a warm champion of the new court chief justice of the old one to fill a vacancy which had occurred on that bench, and for the first time for two years the judicial establishment of the State was on a proper footing.¹

Meanwhile both courts had been sitting and disposing of cases. New appeals from the inferior courts had been entered in the one which the appellant's counsel thought most likely to stand as the rightful authority. The judges of the inferior courts were in despair when the mandates of the Court of Appeals came down, and they were called upon to determine whether to obey them. Some held that the new court was a *de facto court*, and to be respected accordingly. The ultimate decision fell to the old court, which, after the repealing Act of 1826, held that there could

¹ Niles' Register, XXXI, 324; McMaster "History of the People of the United States," V, 162-166; "The Old and the New Court," in "The Green Bag," XVI, 520.

be no such thing as a *de facto* Court of Appeals so long as civil government was maintained and the *de jure* court was in the exercise of its functions.¹

The same spirit of jealousy still occasionally manifests itself in a less outspoken but more effective fashion. If a question of political importance is likely to come before a court, it may be within the power of the legislature to prevent it by a change in its statutory jurisdiction.

In this way the Supreme Court of the United States was kept from passing on the validity of the Reconstruction Acts enacted by Congress at the close of the Civil War, in a case which was actually pending. Under these Acts a Mississippi newspaper editor was arrested in 1867 by military order on account of an article which he had published reflecting on the policy of the government, and held for trial before a military commission. He appealed to the Circuit Court of the United States for the District of Mississippi for discharge on a writ of *habeas corpus*. Judgment went against him, and he appealed to the Supreme Court of the United States. The court, on August 1, held that it had jurisdiction to review the decision and to decide whether he could be tried before such a commission.² The cause was then heard on its merits and all the questions involved discussed at length, four days being devoted to it. Congress apprehended a decision that the Reconstruction Acts

¹ Hildreth's Heirs *v.* M'Intire's Devisee, 1, J. J. Marshall's Kentucky Reports, 206.

² *Ex parte* McCardle, 6 Wallace's Reports, 318, 327.

were unconstitutional, and before one was arrived at, during the same month, passed an act repealing the right of appeal in such cases from the Circuit Court. The purpose of this was obvious, but it was none the less effective, and the court, without deciding the case, dismissed it for want of jurisdiction.¹

A legislature whose work has been set aside by the courts as unconstitutional sometimes asks, in effect, for a reconsideration of the question by passing another law substantially of the same nature, although expressed in somewhat different terms. This is oftenest done when the decision was made by a divided court or is contrary to the weight of judicial opinion in other States. Early in the history of California, for instance, a statute was passed making it a misdemeanor to keep open any store, shop or factory, or to sell goods, on Sunday. The Supreme Court of the State held this to be contrary to the provisions in her Constitution that all men had the inalienable right of acquiring property, and that the free exercise of religious profession should be allowed without discrimination or preference. Most of the other States had similar statutes, and their courts had supported their validity. Judge Stephen J. Field, then on the California bench, dissented in a vigorous opinion.² Three years later the legislature, unconvinced by the reasoning of the majority of his associates, passed a new Sunday law, which did not differ materially from the other, and after a few months the court overruled their

¹ *Ex parte* McCardle, 7 Wallace's Reports, 506.

² *Ex parte* Newman, 9 California Reports, 502.

former decision, on the very ground taken by Judge Field.¹

Any dissent from a judgment setting aside a statute greatly weakens its force. It has also much less claim to public confidence if all the judges on the bench did not participate in it. In 1825, the Court of Appeals of Kentucky declined to follow a decision of the Supreme Court of the United States, which held certain statutes of Kentucky to be contrary to the Constitution of the United States.² The reason stated for this was that the decision was not concurred in by a majority of the court. It had been made by a majority of a quorum, but not by a majority of the whole court.³ After this it became the practice of the Supreme Court under Chief Justice Marshall not to give judgment in any case involving constitutional questions, unless a majority of the court concurred in opinion in regard to these.⁴

Several American courts have asserted the doctrine that the judiciary can disregard a statute which plainly violates the fundamental principles of natural justice, although it may not contravene any particular constitutional provisions. The English courts now claim no such power, although Sir Edward Coke, in one of his discursive opinions, very little of which was necessary for the determination of the cause, asserted that an act of Parliament "against common right and reason" could be adjudged void at common

¹ *Ex parte Andrews*, 18 California Reports, 679.

² *Green v. Biddle*, 8 Wheaton's Reports, 1.

³ *Bodley v. Gaither*, 3 Monroe's Kentucky Reports, 57.

⁴ *New York v. Miln*, 8 Peters' Reports, 118, 122.

law.¹ So far as there was any previous judicial authority for this position, however, it is believed that it can only be found in decisions made before the Reformation, on questions arising from interference by Parliament with rights claimed under the Church of Rome. Such questions were of the nature of those arising under a written Constitution. The law of the church within its province was then accepted as a supreme law.²

The rule laid down by Sir Edward Coke was accepted by the Supreme Court of South Carolina in two early cases,³ and has been substantially repeated in some judicial opinions in other States.⁴ In the Supreme Court of the United States its authority was emphatically denied by Mr. Justice Iredell, near the close of the eighteenth century,⁵ but in 1874 the full court only one member dissenting, held a State statute void which authorized cities to issue bonds in aid of private manufacturing enterprises, because they could only be discharged by taxation, and to tax for such a purpose would be taking property from all for the good of one. That, said Mr. Justice Miller in delivering the opinion, "is none the less a robbery because it is done under the forms of law and is called

¹ Dr. Bonham's Case, 8 Coke's Reports, 114, 118.

² Coxe, "Judicial Power and Unconstitutional Legislation," 147, *et seq.*

³ Ham v. M'Claws, 1 Bay's Reports, 98; Bowman v. Middleton, *ibid.*, 252.

⁴ See Goshen v. Stonington, 4 Connecticut Reports, 209, 225, and Regents v. Williams, 9 Gill & Johnson's Reports, 365, 31 American Decisions, 72.

⁵ Calder v. Bull, 3 Dallas' Reports, 386, 399.

taxation. This is not legislation. It is a decree under legislative form.”¹

This view of the law had been forcibly, though tentatively, put shortly after he came to the bench by Chief Justice Marshall in a leading case,² but one in which it was not necessary to decide whether the doctrine was sound. “It may well be doubted,” he observed, “whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection.”

The weight of American authority is in favor of the position taken by Iredell.³ Time has made it safer to stand upon it, for since he spoke not only have our State constitutions been generally expanded by adding important restrictions on the legislative power, but the fourteenth amendment has added to the Constitution of the United States a prohibition of State laws depriving any person of life, liberty, or prop-

¹ *Loan Association v. Topeka*, 20 Wallace's Reports, 655, 664; approved in *Parkersburg v. Brown*, 106 U. S. Reports, 487, 501.

² *Fletcher v. Peck*, 6 Cranch's Reports, 87.

³ Cooley's "Constitutional Limitations," Chap. VII; *State v. Travelers' Insurance Co.*, 73 Connecticut Reports, 255, 283; 47 Atlantic Reporter, 299; 57 Lawyers' Reports Annotated, 481.

erty without due process of law. "Due process of law" is an elastic term. Requiring it certainly imports that no one is to be made to suffer in person or property unless he has had an opportunity to claim before an impartial tribunal the protection of his rights by the settled law of the land.

The principle of Roman law that, as custom can make law, so disuse can destroy it has never been adopted in the United States. No court, therefore, will pronounce a statute not to have the force of law on the ground that it is obsolete.¹

¹ Chief Justice Mason of Iowa, in 1840, undertook to import the doctrine into American jurisprudence, but without effect. *Hill v. Smith*, Morris' Reports, 70; explained and limited in *Pearson v. International Distillery*, 72 Iowa Reports, 357.

PART II

THE ORGANIZATION AND PRACTICAL WORKING OF AMERICAN COURTS

CHAPTER VIII

THE ORGANIZATION OF THE COURTS OF THE STATES

THE State Constitutions differ fundamentally from that of the United States in respect to the nature of the judicial establishment. Each of the States possesses all judicial powers belonging to any sovereignty, except so far as the people of the United States may have provided otherwise in the Constitution of the United States. The State Constitutions do not define those powers. They simply commit them to certain courts and officers. Their general language is that the judicial power is vested in a Supreme Court and such other inferior courts as may be created by law. On the other hand, the Constitution of the United States defines the judicial powers of the United States exactly and within a somewhat narrow range, investing the courts of the United States with those powers and no others. Hence the States require a much more complicated and extensive judicial establishment than do the United States, for not only is the great mass of litigated cases throughout the country to be disposed of by State courts, but they must also pass upon by far the greatest variety of legal questions.

In each State there is one appellate court of last resort¹ and several courts for the trial of original

¹ See Chap. XIX.

causes. Local justices of the peace are commonly given jurisdiction over prosecutions for petty misdemeanors, and civil cases involving small amounts (seldom over \$50 or \$100), which do not affect title to land. Then come County Courts (often styled Courts of Common Pleas or District Courts), having cognizance of actions involving greater sums, and to which appeals from judgments of justices of the peace can be taken. These generally have both civil and criminal jurisdiction.

A higher court, which may be styled a Superior Court, or Circuit Court, often exists, with unlimited jurisdiction as respects values in controversy, and also as to crimes, the County Courts in such case having a limited jurisdiction in these respects.

Municipal courts are to be found in all considerable cities and in many of the lesser municipalities, such as towns and boroughs. City Courts often have jurisdiction over civil causes to which one residing in the city is a party, or growing out of a transaction occurring within the city, irrespective of the amount of the matter in demand. They frequently have a criminal side, before which convictions may be had for petty misdemeanors, and those charged with higher offenses bound over for trial in some court of general criminal jurisdiction.¹

For the settlement of the estates of deceased persons and the appointment and superintendence of guardians and similar agents of the law, and proceed-

¹ See Goodnow, "City Government in the United States," Chap. ix.

ings in insolvency, there are in many States special courts, known as Courts of Probate, Surrogate's Courts, or Orphans' Courts, and Courts of Insolvency. In others these functions belong to the County Courts.

The early practice in this country favored having several judges hold all trial courts, whether a jury was or was not to be called in. It was a method wasteful of time and money. In Massachusetts it survived for their highest *nisi prius* court until 1804. In many States it endured much longer for County Courts.

County Courts in some States are courts only in name, except, perhaps, for some very limited purposes. Their real functions are administrative. Some or all of those who hold them are often styled commissioners, and their principal duties are to manage the general business affairs of the county.¹ A statute passed by Oregon in 1903 indicates that those in that State are not fountains of law, for it requires the district attorneys in each county, or their deputies, to advise the County Courts "on all legal questions that may arise." In Virginia, County Courts for a long period were held by all the justices of the peace in the county, or such of them as might attend. These magistrates nominated their own successors to the Governor, who almost never refused to commission the person so recommended. The court also nominated the officers of militia below the rank of General, and managed all the county affairs, besides having an extensive civil and criminal jurisdiction, including the

¹ See Constitution of West Virginia, Amendment of 1880; Constitution of Oregon, Art. VII, Sec. 12.

power of acquittal in cases of felony. However clumsy and ill-ordered such a scheme appears, it gave general satisfaction for a long course of years, partly from a usage on the part of the older members of the bar who might be in attendance to volunteer advice as "*amici curiæ*" whenever any doubtful question of law chanced to arise.¹ Even in States where County Courts have jurisdiction of ordinary lawsuits the judges, or a majority of them, are sometimes without any legal training, though this is now less common than it once was.²

The Constitutions of the States generally require the existence of a Supreme Court of last resort, and often specify also by name one or more of inferior jurisdiction. Such courts stand on a firmer footing than those created by the legislature under a general power to establish inferior courts. The power to establish implies a power to limit and to destroy. A tribunal created by a Constitution, with functions defined in the Constitution, is, as to these and as to its independence of existence and action, beyond legislative control.

The Republicans in Congress were within their rights when, in 1802, they repealed the act passed by the Federalists the year before to create a system of Circuit Courts. Those of Massachusetts were within theirs when, in 1811, they abolished the ancient Court of Common Pleas of that State and created a new

¹ Tucker, "Life of Thomas Jefferson," II, 378; Kennedy, "Memoirs of William Wirt," I, 59.

² McMaster, "History of the People of the United States," III, 154.

“Circuit Court,” with fifteen judges, to take its place. Both would have been glad to go farther and reconstitute in some way the court of last resort, which was filled with old Federalists. Why they did not has been frankly stated by one of them in his account of Governor Gerry’s administration :

With the Supreme Judicial Court the party did not interfere. In respect for the authority of the Constitution this forbearance was observed; it having been conceded after due deliberation by men having the confidence of the dominant party that neither the court nor the judges were within the power of the legislature. The result was very reluctantly acceded to, for the imposing influence of that court had been felt in the political agitation of the times, and some of the judges, like some ministers of the gospel, had been unwise enough to give to the extension of their political feelings the aid directly derived from their official authority.¹

The weakest point in this system of judicial organization is the vesting of jurisdiction of small civil causes in justices of the peace. Of these there are generally several in each town, having jurisdiction over the whole county. Some may be lawyers. None need be, and few are. Any one of them can try cases. Which of them shall try any particular case is left to be determined by the lawyer who brings it.

Justices of the peace can be trusted to dispose of petty criminal prosecutions and to conduct preliminary examinations into charges of any offence for the purpose of determining whether there is ground for holding the accused for trial before a jury, although even here mischief often results from their ignorance

¹ Austin, “Life of Elbridge Gerry,” II, 339. See Chap. xxii.

of law, and the sufferers have little means of redress.¹ Such prosecutions are brought by a public officer, who will not be apt to select an incompetent magistrate, and has no strong motive for choosing one specially likely to give judgment against the defendant. But in civil cases, for the lawyer who institutes them to pick out his judge at will from a number who are equally competent to assume jurisdiction, and at the same time (as is generally the law) are left wholly without salaries, receiving nothing except fees for cases actually brought before them, is to place the defendant in a much less favorable position than the plaintiff. If the justice decides in favor of the latter, he is obviously more likely to get the subsequent patronage of his lawyer. In most justice suits judgment does go for the plaintiff, and not infrequently it is to be feared that he gets it from that consideration. Some justices rarely give any other judgment. Many lawyers bring all their cases before one justice, and seldom fail of success.

In 1903, a justice of the peace in one of our largest cities resigned his office and made his reasons public. They were that no one could afford to hold it who was not willing to stoop to unworthy practices. Lawyers having a large collection practice, who were the best customers at such a shop of justice, threw their business where they could get it done most cheaply. They expected the justice of the peace whom they favored to favor them. One way was by making them a discount on his legal fees. There was a competition

¹ See *McVeigh v. Ripley*, 77 Connecticut Reports, 136; 58 Atlantic Reporter, 701.

among the justices for business on these terms, and the lowest bidder generally got it. Blank writs of summons, even, signed by the justice would be sold at so much a dozen, to be filled in to suit the attorneys.

A system in which such things are possible is inherently vicious, and only endurable because the defeated party can always appeal and have a new trial before a higher court. That relief, however, is expensive. Judgments ought to be just in the first instance, and it is the business of governments to ensure this, so far as they reasonably can.

The natural remedy would seem to be to have fewer justices of the peace who are authorized to try cases and to pay them a fixed salary. Better men could thus be had and independence of action promoted. That this is not done comes mainly from the feeling that small controversies ought to be settled by a neighborhood court; that any man of good common sense can generally deal with them as well as a lawyer; and that to salary every justice would be an unreasonable burden to impose on the taxpayer. The system is also an ancient one; it works well with honest men; and the people have an inherited attachment for it.

In a few States a sharp line of division is drawn between courts of law and courts of equity. This distinction was inherited from England, though it has been for most purposes abolished there by the Judicature Acts of 1873 and 1875. It originated in the royal prerogative of interposing to do justice between private individuals in cases of an extraordinary character when the regular courts had no power to grant the necessary relief. The King was accustomed to

refer requests for such action on his part to his principal secretary and councillor. The next step was to address the request directly to this officer, who was styled the Chancellor. If a man were acting toward another in a way that was against good conscience, though without absolutely transgressing any settled rule of law, the Chancellor could compel him to desist. If the legal title to land had been conveyed to one for the use of another, and the holder of this title refused to recognize the beneficial interest to serve which he had been invested with it, the Chancellor could bring him to account, although the common law would give no remedy. Soon, whenever a man seemed to have justice on his side, but not law, it was deemed a case for the Chancellor, or a case in chancery. Relief was given because it was equitable to give it, and so it was called relief in equity. The jurisdiction expanded. Wherever there was a right, but no adequate remedy at law, the Court of Chancery, or, as it was oftener called, of equity, was recognized as competent to step in and do justice.

The Chancellor had often been an ecclesiastic. He was apt to be more familiar with canon law and civil law than with the common law. The justice which he administered came from the Crown, not from the people. The people spoke through a jury, called in law language "the country." The Chancellor spoke for himself. If he called in the aid of a jury, it was to advise him, not, as in a common law court, to make a final decision as to the question submitted to it.

The result came to be that for several hundred years, embracing the whole colonial period, England

had two distinct sets of courts, acting under different rules, and each trying a different kind of cases. Those involving questions of trust, account, fraud, mistake or accident, were the principal subjects of equitable jurisdiction. Equity also could prevent wrongs, while law could only punish them.¹ It was not, however, always easy to mark the line between cases, and say which belonged in the common law tribunals and which in those of chancery. Many an action failed, not because there was no just cause of action, but because it had been brought in the wrong court.

In the American colonies, and for many years in the States which succeeded them, these distinctions of procedure were generally observed.² In some there were, in some there still are, separate courts of equity held by a Chancellor, aided, if necessary, by Vice-Chancellors. In others two dockets or lists of cases were (and in a number of them still are) kept in the same court, and the same judge disposed of those on one docket as a court of equity and of those on the other as a court of law.

Such a system is intrinsically absurd. It has been maintained by whatever States yet tolerate it for two reasons: because the lawyers and the community are used to it, and because it furnishes a convenient test of any claim of right to a jury trial. All our State Constitutions have some provision for maintaining

¹ See Chap. xx.

² In Pennsylvania the courts largely disregarded them and asserted that equity was a part of its common law. See *Myers v. South Bethlehem*, 149 Pennsylvania State Reports, 85, 24 Atlantic Reporter, 280.

such rights, but they do not define the cases in which the right exists. That is left to the courts, and their rule is that it cannot be claimed in cases that call for equitable as distinguished from legal relief.

In most of our States and Territories legal and equitable causes of action or defenses may now be joined, and legal and equitable relief given in one suit. This reform in procedure was largely due to the labors of David Dudley Field, and became general throughout the country during the last half of the nineteenth century. The result has been that separate courts of equity are now to be found only in a few States.

Congress has made use of the State courts in certain cases as part of the machinery of the federal government. While by the Constitution "the judicial power of the United States" can only be vested in the courts of the United States, the phrase as thus used refers only to the power of judging causes in courts of record. State courts and magistrates can therefore be given jurisdiction by Congress over any acts in aid of the functions of the United States, the supervision of which may be regarded as ministerial, or as incidental to judicial power rather than a part of it. They have received it in this way with respect to such matters as seizure of deserters from a merchantman, the arrest and commitment or bail of offenders against the criminal laws of the United States, the taking of affidavits and depositions for use in proceedings before federal authorities, and the naturalization of aliens.¹

State courts also have jurisdiction over any civil action to enforce a right given by the laws of the

¹ *Robertson v. Baldwin*, 165 U. S. Reports, 275.

United States, unless Congress has otherwise provided. They constitute together with the federal courts one general judicial system for the whole country.¹

Almost all American courts are known as "courts of record." A court of record, in modern parlance, is one which tries causes between parties and is required to keep a full official and permanent record of its disposition of them. For this purpose most courts are furnished with a recording officer, called the clerk. His record is the only evidence of their judgments and cannot be contradicted or impeached in any collateral proceeding. If there is any error in it, it can only be shown on a direct proceeding brought to correct it.

Justices of the peace, when authorized to try causes, act only in small matters and in a summary way. In most States they are not, when exercising this function, deemed to constitute a court of record. Nor is any court, even though furnished with a clerk, if its proceedings are not recorded in full, but simply made the subject of brief notes or minutes,² unless there is a statute or local practice giving such notes or minutes the effect of a record.

A court of record has inherent power to preserve order in proceedings before it³ and, unless other provision be made by law, to appoint a crier or other officer to attend upon its sessions. By statute it is commonly made the duty of the sheriff of the county

¹ *Claffin v. Houseman*, 93 U. S. Reports, 130, 137; *Calvin v. Huntley*, 178 Mass. Reports, 29; 59 Northeastern Reporter, 435.

² *Hutkoff v. Demorest*, 104 N. Y. Reports, 655; 10 Northeastern Reporter, 535.

³ See Chap. xx.

to attend all courts of record, either personally or by deputy. He also executes such processes as under the practice of the court may be directed to him. Witnesses and jurors are thus summoned by him to appear before the court; arrests and attachments of property are made; and executions are levied to enforce final judgments.

CHAPTER IX

THE ORGANIZATION OF THE COURTS OF THE UNITED STATES

THE Constitution of the United States (Art. III) provides that there must always be one Supreme Court of the United States. The establishment of such inferior courts as may be deemed proper from time to time is left to Congress.

The judicial power of the United States is limited to cases of certain kinds or between certain kinds of parties. Either (1) the subject-matter of the action must be of a kind that concerns the whole nation, or (2) some party to it must be or claim under a political sovereign, or (3) it must be between a citizen of a State of the Union and one of another of the States or of a foreign country.

In a few of the second class the Supreme Court is given original jurisdiction: in all others of both classes it has appellate jurisdiction, with such exceptions as Congress may think fit to make, save only that no fact tried by a jury can be thus re-examined, except so far as the rules of the common law would have permitted. Its original jurisdiction is confined to cases affecting ambassadors, ministers, and consuls and those to which a State shall be a party. It is not necessarily exclusive as respects any of them,¹ and by the eleventh

¹ *Ames v. Kansas*, 111 U. S. Reports, 449, 469.

amendment to the Constitution is so limited as not to include suits against a State by citizens of any other State or foreign government. In point of fact, few original suits have ever been brought before the court, and almost all of these have been instituted by or against States.

The Supreme Court is held at Washington. There is a Chief Justice with eight associate justices, and each is also assigned for circuit duty as a judge of the Circuit Court of the United States in one of nine judicial circuits into which the country is divided. Originally there were but six judges, and each was required to hold two circuits a year in each district in his circuit. They were assigned to the circuits in pairs, and both sat together with the District Judge. The consequence was that three-fourths of their time was spent in traveling from one court town to another. They complained of this to Congress through the President in 1792, and the next year it was provided that Circuit Courts might be held by one justice, alone or with the District Judge. In 1801, an ultimate reduction of the number to five was provided for. They were to devote their time entirely to the Supreme Court, while the Circuit Courts were to be held by a new set of eighteen Circuit Judges. In 1802, they had only ten cases pending before them, and the average for some years had not exceeded that number. For this and other reasons mentioned elsewhere the Act of 1801 was repealed by the next Congress. In 1807, another Justice of the Supreme Court was added and two more in 1837.

Each circuit has a judicial establishment of its own,

and is composed of a certain number of judicial districts. Of these there are in the whole United States about eighty. The smaller States constitute one district. In the larger ones there are several.

Each district generally has its own judge, called the District Judge, and always its own court, called the District Court of that district. Each circuit has several Circuit Judges, whose main work is to sit in a court held in each circuit, styled the Circuit Court of Appeals. They can also hold a District Court.

Until 1911, the District Courts had a narrow jurisdiction, and there were Circuit Courts having a wider one. In 1911, the Circuit Court was abolished, and the District Court now is the general trial court of the United States in the first instance. Anyone can sue there to enforce a right arising under the laws of the United States when the amount in dispute is more than \$3,000. Rights arising under certain of these laws can only be enforced there, and as to them the pecuniary limitation does not apply. Such are patent-rights and copyrights. Any suit involving an amount exceeding \$3,000 may be brought there when the controversy is between citizens of different States or citizens of a State and citizens of a foreign country. So may a suit by citizens of the same State claiming land under grants from different States, without respect to the value of the subject of controversy. Suits of any of these kinds which are brought in a State court may, at the option of the defendant, be transferred for trial into the District Court. On filing proper papers the case is transferred automatically. The District Court has jurisdiction also over bankruptcy and admiralty

matters, a few other kinds of civil cases of minor importance, and of all offenses against the United States.¹

The pecuniary limit of jurisdiction was for a hundred years fixed at \$500. The increase to \$3,000 was due partly to the fact that the Supreme Court was overburdened by appeals from the trial courts, many of which involved small amounts, and more to a desire to keep judicial power over ordinary controversies between man and man, as far as practicable, in the hands of the State courts.

Early in the nineteenth century a practice began of bringing suits in the Circuit Court of the United States, which purported to be between citizens of different States, but in which the plaintiff had either changed his residence for the purpose of giving the court jurisdiction or was really suing for the benefit of a citizen of the same State with the defendant. This was due to the high opinion entertained of the federal judiciary² and the desire to bring the cause before a federal, rather than a State tribunal. Such a mode of proceeding, while within the letter of the governing statute, was contrary to its spirit, and little better than a fraud. It was also an evident perversion of the intent of the Constitution, and became at last so far-spreading that both Congress and the courts used their best endeavors to put an end to it, and with success.³

Another cause is also effective in lessening the docket of the District Courts. The ordinary lawyer prefers

¹ The Judicial Code of the United States, Chapter II.

² Niles' Register, XXIX, 14.

³ U. S. Statutes at Large, XVIII, 470; *Hawes v. Oakland*, 104 U. S., 450, 459.

to sue in a State court, when he has the choice, on account of his greater familiarity with the practice there. Many American lawyers have never brought an action in a federal court. Most cases which could be so brought can also be and are brought in a State court.

Congress has thus far maintained for the federal courts the ancient distinction between procedure in law and in equity explained in the preceding chapter. There are those who claim that the reference in Art. III, Sec. 2, of the Constitution of the United States to "cases in law and equity" requires its preservation; but this seems a strained construction of the phrase. Separate dockets are kept in the District Court of legal and of equitable actions. They are brought in different form, tried in a different way, and disposed of by different rules, though by the same judges and at the same term of court. As to equity cases, the rules of the old English chancery practice are substantially followed. In cases of a common law nature, the practice existing at the time in regard to those of a similar kind in the courts of the State within which the federal court may be held is to be followed, as nearly as may be.¹ In fact, there is a departure from it in many points in most States,² and in vital ones in those which have reformed their procedure in civil actions by fusing remedies at law with those in equity. If an action framed in this method be removed from a State court to a federal court, the plaintiff must thereupon split it in two, and present

¹ U. S. Revised Statutes, § 914.

² See *Nudd v. Burrows*, 91 U. S. Reports, 426.

his case at law on one set of papers and his case in equity on another.

The Supreme Court, under power derived from acts of Congress, has framed rules of procedure for the inferior trial courts of the United States in equity and admiralty cases, and the latter courts have supplemented them by further rules of their own making. The Equity Rules promulgated by the Supreme Court were revised in 1912, and took effect as changed in 1913.¹ They greatly simplify the former procedure. Suits are now tried generally on oral testimony taken stenographically in open court. Formerly the evidence was usually given before officials known as examiners or masters in chancery. The former reported the testimony at length to the trial court. The latter reported their conclusions from it.

The new rules have abolished demurrers in equity causes in favor of what is substantially the present English practice.²

In common law causes in the District Court, the State remedies by way of attaching the property of a defendant to respond to a judgment, or seizing it on execution, or imposing a lien upon it by a judgment, are adopted and enforced.³

The field of national legislation being narrow, the offenses against the nation are correspondingly few. Any acts done on lands ceded by a State, which would have been crimes under its law in 1873, may be pun-

¹ They are printed in Volume 226 of the United States Reports.

² See *infra*, page 203.

³ U. S. Rev. Stat., §§ 915, 916, 967, 988.

ished as such in the federal courts in the same manner which that law provided.¹

In the Circuit Courts, before 1866 it was customary to defer the trial of important causes until the Justice of the Supreme Court assigned to the circuit could be present. If he differed on any material point from the District Judge, this point could be certified up to the full Supreme Court for argument and decision there. During this period the published reports of the decisions of the Circuit Court contain many opinions of the highest value. Several of the best which Story and Bushrod Washington wrote are to be found among them.

The Act of 1866, by which a resident Circuit Judge was appointed for each circuit, provided notwithstanding that each member of the Supreme Court should attend at least one term of the Circuit Court in each district as often as once in two years. The press of business at Washington, however, soon became such as to make it practically impossible for the Supreme Court Justices to do any substantial circuit work. When some case of national importance was to be heard in any district, the Justice in whose circuit it was included would make a special effort to go down. In this way Chief Justice Chase heard and sustained the plea with which Jefferson Davis met the indictment against him for treason. But ordinarily the Circuit Judge took the place of the Supreme Court Justice, and the latter, if he appeared at all during the term, remained hardly for a day.

The Supreme Court, therefore, during over a hundred years remained the only court of the United States existing mainly for appellate purposes. The

¹ Ibid., § 5391.

work which it had before it at the last term during which it occupied this position (October Term, 1890) will show how much it was then overburdened.

Its docket contained 1,177 appeals brought forward by continuance because they could not be disposed of at the preceding term, 623 new cases of the same kind, and 16 cases of original jurisdiction, making a total of 1,816 actions. Of these, although the term lasted nearly eight months, it was only able to dispose of 617, thus leaving 1,199 for continuance to the following term.¹ It will be observed that the court was no longer able to cope with its new business, not to mention that left over from previous years.

Appeals now lie in most civil cases from the final judgments of the District and Circuit Courts, and from convictions for infamous crimes, not capital, to the Circuit Court of Appeals. They also extend to judgments granting a temporary injunction. There is a court of this name for each of the nine circuits, which was established in 1891 for the further relief of the Supreme Court and the speedier termination of litigation. This measure originated in the American Bar Association, by which it was pressed upon the attention of Congress. It had become an absolute necessity to devise some plan of expediting the disposition of appeals from the trial courts of the United States. There was more than enough of such business by the close of the Civil War (the events attending which brought up for decision many novel questions of the highest importance) to require the entire attention of the Supreme Court. It soon took

¹ 140 U. S. Reports, Appendix.

three years after an appeal was docketed before it could be reached for argument. This was intolerable, and it was obviously necessary either to restrict the liberty of appeal; to constitute divisions of the court, one to hear appeals of a certain class and another those of another class; or to set up an intermediate court. The last method was preferred. The practice in the Circuit Court of Appeals is governed by rules of its own making, but in general conforms to that of the Supreme Court of the United States in appealed cases.

The commission appointed some years since to prepare a revision of the laws of the United States have reported in favor of abolishing all jurisdiction of the Circuit Court over original cases and turning it into an appellate court.¹ Should this recommendation be adopted, the District Court would acquire the jurisdiction now vested in the Circuit Court, the District Judges would sit in the District Court only, and the Circuit Court Judges in the Circuit Court only, while the Circuit Court of Appeals would come to an end.

The American Bar Association voted in 1903 that it was desirable to establish a new appellate court to sit at Washington and take cognizance of patent and copyright cases. Such a measure would tend to relieve the Supreme Court of the United States of any undue pressure of business, and promote both uniformity and promptitude of decision in a class of actions in which promptitude and uniformity are of special importance. As things stand now, a patent may be pronounced invalid in one circuit and upheld in

¹ Senate Doc. 68, 57th Congress, 1st Session.

another by courts of equal authority; and while in such event the Supreme Court would probably, on a special application, call both these judgments up before it for review, this remedy cannot be claimed as a matter of absolute right, and is at best a slow one.

The Circuit Court of Appeals is held by three judges, two constituting a quorum. Those generally sitting are the Circuit Judges belonging to the circuit. The Justice of the Supreme Court assigned to the circuit may also sit, and any of the District Judges in the circuit can be called in.

Except in a very limited class of cases, the decision of this court is final, unless the Supreme Court, on special application, should think the questions involved to be of sufficient importance to require a review, when it can order the record sent up to Washington for that purpose. The Circuit Court of Appeals can also of its own motion certify up any questions in a cause to the Supreme Court for its instructions before making a final disposition of it.

The Supreme Court has direct appellate jurisdiction over the District and Circuit Courts in cases turning on the limits of their jurisdiction, in prize causes, in equity suits by the United States under the statutes regulating inter-State commerce, and in all cases involving the construction or application of the Constitution of the United States, or of a treaty. Appeals also lie to it from judgments of conviction in the Circuit Court for capital offenses.¹

The consequence of the Circuit Courts, which had been impaired by the practical withdrawal of the

¹ 29 U. S. Statutes at Large, 492; 32 *ib.* 823.

justices of the Supreme Court, was further lessened by the creation of the Circuit Court of Appeals. Before that their judgments in most cases were final. In criminal causes there was no appeal, and in ordinary civil causes none after 1875, unless the matter in controversy exceeded \$5,000 in value. This left the life, liberty and property of the citizen too much in the hands of one man; and the people, led by the bar, insisted on stripping him of powers so liable to abuse.¹

No sovereign can be sued in his own courts without his consent. The United States consent to be sued on most claims against them of a contractual nature, which they may dispute. For this purpose a Court of Claims has been established at Washington, consisting of a Chief Justice and four associates. Originally it was little more than an administrative bureau; but by successive amendments of the law it has come to have fully a judicial character,² except in one particular. It is a general principle that a court will make no decree that it cannot enforce. The Court of Claims cannot issue an execution to enforce its judgments. Money can be drawn from the treasury of the United States only to meet appropriations made by Congress. An appropriation is made by each Congress of a gross sum to satisfy any judgments that have been or may be rendered by the Court of Claims; but should this provision be omitted in any appropria-

¹ See an attack on a similar state of things existing in Louisiana at one time in the District Court, by Edward Livingston in 1826. Hunt, "Life of Edward Livingston," 302, 303.

² *United States v. Klein*, 13 Wallace's Reports, 128, 144; 24 U. S. Statutes at Large, 505.

tion bill the judgments of the Court of Claims could not be collected.

Concurrent jurisdiction in these respects is given to the District Court of claims not exceeding \$1,000 in amount, and to the Circuit Court of those exceeding \$1,000 and not exceeding \$10,000.

Aliens can sue in the Court of Claims when their own country accords a similar privilege in its courts to citizens of the United States.¹

This court has also a peculiar kind of advisory jurisdiction. Congress, or any committee of either house, can refer to it any questions of fact which may have come before them. The judges must then ascertain the facts and report them back. The head of any of the great executive departments may, in like manner, in dealing with any claim against the government, if the claimant consents, refer any uncontroverted questions, either of fact or law, to the court, which must then report back to him its findings and opinion. This does not take the form of a judgment, for there is no case and no parties are before it. It is a mere expression of opinion, and stands on much the footing of the report of a committee of inquiry to a superior authority.²

A temporary court is also in existence called the Court of Private Land Claims. This is composed of a Chief Justice and four associate justices, and has jurisdiction to hear and determine claims of title to land as against the United States, founded on Spanish or Mexican grants in New Mexico, Arizona, Utah, Nevada, Colorado or Wyoming. An appeal from the

¹ U. S. Revised Statutes, § 1068.

² 22 U. S. Statutes at Large, 485; 24 *id.*, 507.

final judgment is given to the Supreme Court of the United States.¹

The District of Columbia has a special judicial establishment. There is a court of general jurisdiction known as the Supreme Court of the District of Columbia, and appeals from its judgments lie to the Court of Appeals of the District of Columbia. This is composed of a Chief Justice and two associate justices, and its judgments are reviewable by the Supreme Court of the United States, if \$5,000 is involved, or the validity of an authority exercised under the United States or a treaty or Act of Congress is in question. An appeal also lies to it from decisions of the Commissioner of Patents as to claims of a right to a patent.²

When new territory comes by conquest or cession permanently under the jurisdiction of the United States, it belongs to the President, in the exercise of his executive power, to see to its proper government until Congress makes other provision. He can institute courts there for that purpose, or if he finds courts created by the former sovereign in existence, can expressly or impliedly permit them to continue in the exercise of judicial functions.

Each fully organized Territory has a set of local courts and one Supreme Court to which appeals can be taken and the judgments of which, in cases of large pecuniary magnitude or great legal importance, can be reviewed by the Supreme Court of the United

¹26 U. S. Statutes at Large, 854.

²27 U. S. Statutes at Large, 434.

States. These territorial courts do not exercise what is known in the strict sense and designated in the Constitution as "the judicial power of the United States." They are created to meet temporary conditions, and with judges whose commissions run only for a few years. Such courts are instruments through which Congress exercises its power of regulating the territory of the United States. They act judicially. They have judicial power. But the source of this power is not the clause in the Constitution under which the judicial power of the United States is defined.¹ It is therefore not necessary to confine such courts strictly to the consideration of judicial business. In the organization of our earliest Territories the judges were given legislative functions, and while this was originally due to the terms of the Ordinance of 1787, it was confirmed by various Acts of Congress after the adoption of the Constitution of the United States.

The Philippines are governed under an Act of Congress by a commission acting under the supervision of the Secretary of War.

The organization of courts established by Spain has been in substance preserved. The Spanish law which was in force there was expressed in codes mainly founded on those framed for France under Napoleon I. In 1901, the Spanish code of civil procedure was supplanted by one prepared by a member of the Philippine Commission, and which is now familiarly known by his name as the Ide Code. In substance, it establishes the mode of proceeding in civil cases which

¹ American Insurance Co. v. Canter, 1 Peters' Reports, 511.

is known in the United States as code pleading. Trial by jury has not been introduced into the Philippines either in civil or criminal causes, and need not be.¹

In criminal causes, the Spanish system was originally retained, allowing either party, the United States or the defendant, to appeal from the judgment of the court of first instance to the Supreme Court of the islands and have there a new hearing both as to fact and law. This, however, so far as concerns an appeal by the government, was held to be contrary to the Act of Congress under which it was constituted.²

The courts of the United States are generally provided with an officer styled a marshal. He executes their process, attends their sessions, and exercises in general the functions which belong to a sheriff as respects State courts.

Each District Court appoints a convenient number of District Court Commissioners, who issue warrants of arrest on criminal proceedings, take bail, inquire whether there is probable cause to hold the accused to answer to the charge in court, and discharge in such respects substantially the functions generally belonging to justices of the peace in the States.

¹ *Dorr v. United States*, 195 U. S. Reports, 138.

² *Kepner v. United States*, 195 U. S. Reports, 100.

CHAPTER X.

RELATIONS OF THE STATE JUDICIARY TO THE UNITED STATES AND OF THE UNITED STATES JUDICIARY TO THE STATES

EVERY judicial officer of a State is required by the Constitution of the United States to bind himself by oath or affirmation to support it, and this obligation compels him to respect every Act of Congress made in pursuance of the Constitution, and every treaty made under the authority of the United States, as, in case of conflict, superior to anything in his State Constitution or laws.

The courts of the national government are complementary to those of the States. Both belong to one judicial system. Rights arising under the laws of the United States may be enforced by a State court as well as by a federal court, and rights arising under a State law by a federal as well as by the State court, unless in cases where there is some special restriction upon its jurisdiction. Such a restriction may be imposed by either government, as respects any right which it creates.

The judicial power of the United States extends only to certain classes of cases. As to some of these it is necessarily exclusive: as to any of the rest Congress can make it such.¹ On the other hand Congress

¹ The *Moses Taylor*, 4 Wallace's Reports, 411, 429.

may assume to invest a State court with power to dispose of a certain matter of federal right, and the State may decline to permit the exercise of such a power. The United States cannot in that manner compel the courts of another government to do their bidding. It would tend to throw on the States a greater burden than they might deem necessary or proper. They provide courts to meet the wants of those looking to their own sovereignties for justice. Thus, although nothing could seem more anomalous than for one sovereignty to confer citizenship in another, the laws of the United States allow naturalization to be obtained by proceedings in State courts. Most aliens who become citizens of the United States do so in that way, because the State courts are more easy of access. But a State can at any time restrict or forbid the use of its courts for such a purpose.¹

The federal courts can lend their aid to carry into effect a right arising wholly from the statute of a State, even if it affect maritime interests and must be enforced, if at all, through an admiralty court. Admiralty suits, it is true, can only be brought in the courts of the United States, but that is the very reason why, if such a suit gives the only remedy, jurisdiction of it should be entertained in the only sovereignty competent to give relief.²

There are many civil cases which can be brought, at the option of the plaintiff, either in a court of the United States or in a State court. Some of these, if

¹ Stephens, petitioner, 4 Gray's (Mass.) Reports, 559; *State v. Judges*, 58 N. J. Law Reports, 97; 32 Atlantic Reporter, 743.

² *The Lottawanna*, 21 Wallace's Reports, 558, 580.

brought in a State court, the defendant can, at his option, allow to remain there or remove for trial into the Circuit Court of the United States. Criminal prosecutions by a State may also be removed, under certain conditions, to the Circuit Court of the United States, when the defense is one arising under the laws of the United States.

In any cause tried in a State court, if the decision turns on a claim of right, set up under the Constitution, laws or treaties of the United States, and is against its validity, the losing party, if unable to secure its reversal by appeal to a higher court of the State, can ask such relief from the Supreme Court of the United States.

It will be observed that it is the losing party only who has this remedy. If the State court decides, however erroneously, that the claim of a federal right is well grounded, this is conclusive as respects the controversy in that suit. If all State courts in which the validity of an unconstitutional Act of Congress was contested should uphold it, the courts of the United States would be powerless to right the wrong, unless they were called upon to enforce the statute in some suit brought before them for original trial.

The obvious object of the limitation is to preserve so far as is possible the sovereignty of the States. The courts of the nation are to set aside acts or judgments flowing from that only in case of necessity and to preserve rights flowing from the sovereignty of the nation. For the same reasons, resort can be had to the Supreme Court of the United States only after every right of review given by the laws of the State

has been exhausted. Usually this requires one who loses his cause in a trial court to take it up to the State court of last resort. Where, however, this is not permitted by the State law, he may ask for a writ of error from the Supreme Court of the United States to whatever court was the highest to which he was able to remove it; and if, by the State law, he was unable to appeal at all, then the writ will go to the trial court. One of the greatest of Chief Justice Marshall's great opinions was rendered on a writ of error to the quarterly session court for the borough of Norfolk in Virginia, held by the mayor, recorder, and aldermen of the borough.¹

It was the opinion of Hamilton that an appeal might be given from the State courts to the inferior federal courts, in case of a decision turning on a right claimed under the Constitution or laws of the United States.² This is probably true, but Congress has wisely forbore to make any such provision. It imposes a strain sufficiently great on the sovereignty of a State to subject the judgments of its court of last resort to reversal by the Supreme Court of the nation.

The power to declare a statute void because inconsistent with constitutional provisions belongs to every court in every case in which such a statute is relied on either to support the action or in defense.³ It therefore belongs, as respects a State statute which may be attacked as inconsistent with the Constitution of the United States, to the trial courts of the United States as well as to the Supreme Court. This makes it pos-

¹ *Cohens v. Virginia*, 6 Wheaton's Reports, 264.

² *Federalist*, No. LXXXII. ³ See Chap. VII.

sible for a District or Circuit Court of the United States to adjudge the statute of a State in which it sits to be unconstitutional and void, although it may have been declared valid by a judgment of the highest court of the State, from which no appeal to the Supreme Court of the United States was ever taken.

However derogatory to the sovereignty of the States the possession of such authority may seem and be, it is evidently a necessary feature of our dual system of government. In some way it was indispensable to provide for maintaining the full powers of the United States against encroachments by State legislation, and also for enforcing all the special limitations on the powers of State legislation which the Constitution of the United States lays down. This could have been done effectually in but two ways: either by giving to Congress or to the President a veto upon State laws; or by leaving the right of control to lie dormant until a necessity for exercising it should arise, and then putting it in the hands of the judiciary. The latter method was clearly open to the least objection.¹

Jefferson maintained that there was a third, and one which the Constitution expressly provided. This was the calling of a convention of all the States for proposing amendments to it. If, he said, a State on the one hand by her highest authorities asserts a certain line of action to be within her powers, and the United States by their highest authorities deny it, "the ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress,

¹ See Hamilton's discussion on this point in the *Federalist*, No. LXXX.

or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs.¹ There seems a plain fallacy in this proposition. The question to be decided, in case of a conflict of judicial authority, is not which doctrine ought to be adopted, but which was adopted when the Constitution was framed. To amend that instrument and make it something else could not justly be allowed to alter the effect of acts previously done.

But one serious proposition has ever been made to call a national constitutional convention for any such purpose. That was by Kentucky in January, 1861, when civil war was threatened; and it was not pressed. The very delays which would be inevitable in assembling such a body were then a reason for the call, for they would give time for the "sober second thought." The plan, however, seemed and probably was impracticable. The movement toward secession had gone too far.²

There were many, at the time when the Constitution of the United States was before the people for ratification, who feared that the jurisdiction of their courts would be extended by judicial construction beyond the limits of the grant. New York in her vote of ratification incorporated a declaration that she understood it to be impossible that the jurisdiction of any court of the United States could ever be enlarged "by any fiction." In the Maryland Convention, this senti-

¹ Letter to Mr. Justice Johnson, Tucker, "Life of Thomas Jefferson," II, 455.

² Debates and Proceedings of the National Peace Convention, 45, 61, 67.

ment took shape in a proposed amendment to the Constitution adopted by a committee appointed for the purpose, but never reported, "that the Federal courts shall not be entitled to jurisdiction by fictions or collusion."¹ Had such an amendment been proposed and adopted, it would have cut off a large share of the most important cases now brought before the Circuit Courts. In 1787, there were only twenty-seven business corporations in the United States.² It was not long before they became countless and the large affairs of the country were in their hands. Could they sue and be sued in the courts of the United States? The decision on this point was that, by force of a pure legal fiction, invented for the purpose, they might be. They were, indeed, not citizens of any State;³ but the persons who composed them probably were. Therefore, it must be assumed that they certainly were, and also that they were all citizens of the same State and that the State from which incorporation was obtained.⁴

Sir Henry Maine maintained that legal fictions were the rude device of early stages in government, and to add to them disturbed the symmetry of a legal system and was unworthy the approval of modern courts.⁵ But while they are among the things that it is hard

¹ Elliot's Debates, 550; Proceedings Massachusetts Historical Society, XVII, 504-7.

² Report of the American Historical Association for 1902, 267; *American Historical Review*, VIII, 449.

³ *Paul v. Virginia*, 8 Wallace's Reports, 168.

⁴ *Louisville, Cincinnati and Charleston R. R. Co. v. Letson*, 2 Howard's Reports, 497, 555; *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 Black's Reports, 286. ⁵ *Ancient Law*, 26.

to justify on principle, it is harder to dispense with them in actual practice, as the instance given conspicuously illustrates.

Although the United States are the only depositary of the power of ordering foreign relations, foreign governments are often aggrieved by acts of the courts of a State which the United States have but imperfect means of preventing or rectifying.

In 1841, we were brought to the verge of war with Great Britain by an incident of this nature.

An insurrection broke out in Canada in 1837, and a New York steamboat was chartered to bring supplies across the Niagara River to those engaged in it. One night when she was moored on the New York side of the river a party of loyal Canadians seized and burned her. During the accompanying affray an American was killed. A Canadian named McLeod, who was charged with having fired the fatal shot, was afterwards arrested in New York and indicted for murder. The British government then informed ours that it had ordered the burning of the steamer, and thereupon demanded McLeod's release. Our Secretary of State replied that the prosecution was in the hands of the State of New York, and the United States had no control over it. Lord Palmerston made the affair the subject of a dispatch, in which he stated that McLeod's execution would produce "a war of retaliation and vengeance." The President at once requested the Governor of New York to order a discontinuance of the prosecution. This was declined, but with a promise to grant a pardon in case of conviction.¹ The

¹ Lothrop, "Life of William H. Seward," 35.

State courts refused to discharge the prisoner. He was tried on the original charge, but acquitted.

Congress in 1842 did what it could to prevent the recurrence of such a conflict of authority by passing an Act giving the Circuit and District Courts of the United States jurisdiction on *habeas corpus* proceedings in favor of foreigners held by State authority, who might claim a right of release under the principles of international law.¹

The Circuit Court has since 1875 been given power to entertain original jurisdiction of any causes arising under the Constitution, laws or treaties of the United States, regardless of the citizenship of the parties, if a value of \$2,000 is involved. In all cases, also, of imprisonment by State authority, whether under arrest before trial or after a sentence of conviction, in violation of rights claimed under the Constitution, laws or treaties of the United States, the prisoner may now be summarily discharged on a writ of *habeas corpus* by a court or judge of the United States. Ordinarily, however, as a matter of comity, he will be left to seek his remedy in the State courts, and if without success there, on a writ of error from the Supreme Court of the United States.²

The State courts have no power to release on *habeas corpus* one who is held under the authority of the United States. If that authority has been illegally exerted, his remedy is in the federal courts alone.³

¹ U. S. Revised Statutes, § 762.

² *In re Neagle*, 135 U. S. Reports, 1; *Ex parte Royall*, 117 U. S. Reports, 241.

³ *Ableman v. Booth*, 21 Howard's Reports, 506.

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The cases in which a State can be sued in an original suit in the Supreme Court of the United States are defined in the Constitution and, as limited by the eleventh amendment to it, are quite few.

Several such actions have been brought. In the earlier ones, the State declined to recognize the jurisdiction of the court and did not enter an appearance. The court thereupon decided to proceed *ex parte* on hearing the plaintiff;¹ and in the later cases the States have appeared and made defense.

The court, in one of these suits, was asked to issue an injunction in favor of the Cherokee Indians against the State of Georgia to prevent her and her Governor, judges and other officers whatsoever from enforcing certain of her statutes which were alleged to be unconstitutional. The case went off on another point, but the majority of the court intimated it to be their opinion that no such injunction could properly issue against a sovereign State. Marshall thought it savored "too much of the exercise of political power to be within the proper province of the judicial department." Mr. Justice Johnson said that it was an attempt to compel the President of the United States, and by indirection, to do what he had declined to do on the plaintiff's application to him; namely, "to declare war against a State or to use the public force to repel the force and resist the laws of a State."²

¹ See *New Jersey v. New York*, 5 Peters' Reports, 283; U. B. Phillips, "Georgia and State Rights;" Report of American Historical Association for 1901, II, 83.

² *Cherokee Nation v. Georgia*, 5 Peters' Reports, 1, 19, 29.

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It would be no easy thing to enforce a judgment against a State should it resist. Hence the Supreme Court has been justly reluctant ever to make any order which would take money out of a State treasury, unless in cases where the Treasurer was individually sued, and the money in dispute was not mingled with other public funds. In 1794, four years before the adoption of the eleventh amendment, a judgment against the State of Georgia, authorizing an assessment of general money damages against her, had been entered in the Supreme Court in favor of one Chisholm, to whom she owed a debt. Georgia had refused to enter an appearance in the suit, and in anticipation of this result her House of Representatives had resolved, in 1793, that if any Federal marshal should attempt to levy an execution on such a judgment against the State, it should be a felony, and on conviction he should be hanged. The Senate had not concurred in this measure, but it reflected pretty closely the general state of public feeling in a State largely indebted for what her people thought it belonged to the United States to pay. The eleventh amendment was proposed by Congress during the term of court at which judgment was entered, but not adopted until 1798. Meanwhile, the court had thought best to defer further proceedings, and none were ever taken afterwards. The plaintiff therefore won a barren victory.¹

The appellate jurisdiction of the Supreme Court of the United States over States is large, for the State

¹ U. B. Phillips, "Georgia and State Rights," Report of American Historical Association for 1901, II, 25.

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is the party in whose name all criminal prosecutions in its courts are brought, and in many of these the defendant sets up some claim under the laws of the United States which is overruled.

Here again, in case of resistance, it would be difficult to enforce a judgment of reversal.

Shortly before the action of the Cherokee Nation for an injunction, the Georgia courts had sentenced Corn Tassel, one of the tribe, to death for murdering another of them. Tassel had claimed that by the laws of the United States and their treaty with his nation he could only be prosecuted before one of his tribal courts. He obtained a writ of error from the Supreme Court to review his case on this ground. It was served, but before it could be heard the day set for his execution had arrived. By the laws of the United States the allowance of the writ of error superseded the sentence until the appeal should be decided. The Governor laid the matter before the legislature, saying that he did not propose to regard any orders from the Supreme Court interfering with those of Georgia courts, and should resist any attempt to enforce them with all the forces at his command. The legislature approved his position,¹ and Tassel was hanged on the day originally set.² There had been no time to resort again to the Supreme Court for relief, and as soon as he was dead his writ of error fell with him, for such a proceeding is legally terminated if the plaintiff in error dies.

¹ U. B. Phillips, "Georgia and State Rights," Report of American Historical Association for 1901, II, 77.

² "Memoirs of William Wirt," II, 291.

Two years later, Rev. Mr. Worcester, a missionary who had gone to teach the Christian religion to the Cherokees, was convicted in the Superior Court of Gwinnet County on an indictment for residing among them without a license from the State, and sent to the State prison. He appealed to the Supreme Court of the United States, which decided that Georgia had no jurisdiction over the Cherokee reservation, and could not require such licenses. The judgment against him was therefore reversed, and an order made "that all proceedings on the said indictment do forever surcease; and that the said Samuel A. Worcester be and hereby is henceforth dismissed therefrom, and that he go thereof quit without day, and that a special mandate do go from this court to the said Superior Court to carry the judgment into execution."¹ The Superior Court of Gwinnet County paid no respect to this mandate; the Governor of Georgia characterized it as an attempt at usurpation which he should meet in a spirit of determined resistance; and Worcester remained in prison until, on expressing his willingness to abandon any further efforts for his discharge by authority of the judgment on his writ of error, the Governor gave him a pardon on condition of his leaving the State.

A year later, James Grady, who lay under a sentence of death under proceedings similar to those in Tassel's case, like him obtained a writ of error from the Supreme Court of the United States and had it served on the Georgia court, only to find it disregarded. His execution, in spite of the "*supersedeas*"

¹ Worcester v. Georgia, 6 Peters' Reports, 515, 596.

which goes by law with every such suit, was the last of this series of judicial outrages.¹

It was unfortunate for the sufferers in these proceedings that they took place at a time when the cry of "State Rights" was particularly loud and general in the South. South Carolina had been quieted with difficulty by Jackson's action in regard to her nullification ordinance, and he did not wish to go farther than he thought it necessary in insisting on the supremacy of the United States.

Since the Civil War, such defiance by a State of the authority of the Supreme Court of the United States has been unknown and would be almost inconceivable. The absolute right of the Supreme Court of the United States to pronounce finally, so far as the States are concerned, upon every question brought before it as to the meaning and effect of the national Constitution, has come to be universally acknowledged.

The courts of a State have the same right, except that it is not final. This the original Judiciary Act of 1789 (Sec. 25) fully recognized. Something like it may belong to a Convention of the whole people of a State, called to act upon its fundamental concerns; for that would represent the sovereignty of the State as a whole in the fullest manner. It was from such a convention that the nullifying ordinance of 1832 proceeded, but the vice of its action was, not so much that it pronounced the protective tariff Acts unconstitutional and void, but that it assumed to deny any right of appeal in litigation growing out of these Acts and the

¹ "Georgia and State Rights," 83.

Ordinance of Nullification, from the courts of South Carolina to the courts of the United States. This liberty of appeal in the regular course of judicial procedure is the one thing which keeps the United States in existence.

The law governing the ordinary transactions of life is that of the State where they may have their seat. This was affirmed in the original Judiciary Act,¹ as a general rule for the courts of the United States in trials at common law. By another Act of Congress,² the practice, pleadings, and form and mode of proceeding in civil causes, other than those of equity and admiralty jurisdiction, in the Circuit and District Courts are to conform as nearly as may be to that followed in the State within which these courts may be held.

The State laws which are thus made a rule for the United States courts are the law of the State as it is understood and applied in its own courts. Hence the construction of a State statute, or the doctrines of the common law in a particular State, if definitely settled by the courts of that State, must be followed in subsequent litigation in the federal courts. Where, however, a State court has taken a certain position as to what the law is, and afterwards changes its position, the federal courts are not compelled to change with it,

¹ U. S. Revised Statutes, § 721. As "equity follows the law," State legislation creating new equitable rights or varying those formerly established also affects causes in equity in the Federal courts. *Brine v. Insurance Co.*, 96 U. S. Reports, 627; but see *James v. Gray*, 131 Federal Reporter, 401.

² *Ibid.*, § 914.

if this would do injustice to one who has meanwhile acted on the faith of the original ruling.¹

Nor are the federal courts, in large questions of a commercial nature, bound always to accept the opinion of a State court as to what the common law of the State may be. The manner in which this doctrine has been evolved is an interesting example of the manner in which law develops by litigation, and new points are struck out in a single case as the joint product of lawyer and judge.²

A bill of exchange drawn in Maine on one Tyson, a merchant in New York, and bearing his acceptance, was indorsed over to one Swift, who took it in good faith before it fell due, in payment of a pre-existing debt. He sued Tyson upon it in the Circuit Court of the United States in Maine. If his rights were as good as if he had paid value for it at the time he received it, he was entitled to recover. If not, his action failed; for the acceptance had been obtained by fraud. It was made in New York. The judicial decisions of that State, contrary to the prevailing opinion as to what was the general common law rule, seemed to favor the view that a pre-existing debt did not stand on as good a footing as a present payment, in support of a claim upon negotiable paper. Samuel Fessenden of Portland, a lawyer of great ability, was his counsel. The cause was submitted on briefs, without oral argument. Mr. Fessenden, admitting that

¹ *Burgess v. Seligman*, 107 U. S. Reports, 20, and see argument of Daniel Webster in *Groves v. Slaughter*, 15 Peters' Reports, 449, 489.

² See Chaps. xvii, xviii.

the law of the place where acceptance was made must govern the obligations of Tyson, insisted that the New York decisions were wrong in principle and ought not to be regarded.

"If," said his brief, "there is any question of law, not local, but widely general in its nature and effects, it is the present question. It is one in which foreigners, the citizens of different States in their contests with each other, nay, every nation of the civilized commercial world, are deeply interested. By all without the United States this Court is looked to as the judiciary of the whole nation, known as the United States, whose commerce and transactions are as widely diffused as is the use of bills of exchange. . . . How can this Court preserve its control over the reason and affections of the people of the United States; that control in which its usefulness consists, and which its own untrammelled learning and judgment would enable it naturally to maintain; if its records show that it has decided—as it may be compelled to decide if the construction referred to, advocated on the part of the defendant, is established—the same identical question, arising on a bill of exchange, first one way, and then the other, with vacillating inconsistency?"

Mr. Dana, for Tyson, maintained the opposite view with equal ability. "In coming together," he said, "from the respective States, the framers of the Constitution, and our representatives in Congress after them, must be regarded as having had in view the language, laws, and institutions of the States which they represented."

Mr. Justice Story gave the opinion of the court. Referring to the provision in the Judiciary Act (now U. S. Revised Statutes, Sec. 721) above mentioned, on the construction of which the case must turn, "It

never," he remarked, "has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. . . . The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R., 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"¹

This opinion had been submitted to the court for the first time during the evening before it was delivered.² It could not have received any very close scrutiny. It relied on no authority except that of Cicero, for Lord Mansfield, in the case of *Luke v. Lyde*, was speaking of the law of the sea, which in the nature of things no one nation can prescribe or change. It was not easy to reconcile it with precedents cited by Mr. Dana, in one of which Mr. Justice Chase of the same court had

¹ *Swift v. Tyson*, 16 Peters' Reports, 1, 8, 9, 10, 11, 13, 18.

² *Ibid.*, 23.

held on the circuit as early as 1798 that the United States had no common law of their own, and that the "common law, therefore, of one State is not the common law of another; but the common law of England is the law of each State, so far as each State has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a Federal, or State, Court."¹ So the Supreme Court itself had said, in 1834, in a famous judgment, concurred in by Mr. Justice Story himself, that "it is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated."²

The State courts have looked upon the doctrine announced in *Swift v. Tyson* with an unfriendly eye. In some, its authority is denied.³ In none will it affect the disposition of a cause turning upon its own law, and not pending in the federal courts. It has,

¹ *United States v. Worrall*, 2 Dallas' Reports, 384, 394.

² *Wheaton v. Peters*, 8 Peters' Reports, 658.

³ See *Forepaugh v. Delaware, Lackawanna and Western R. R. Co.*, 128 Pennsylvania State Reports, 217; 18 Atlantic Reporter, 503.

however, been repeatedly reaffirmed by the Supreme Court of the United States, though the later decisions appear to limit its effect to questions growing out of commercial transactions not wholly confined to a single State.¹

The right of recovery on a cause of action of a commercial nature will therefore often depend on the court which the plaintiff selects. If he sues in a State court, the common law of the State, as the judicial authorities of that State declare it to be, will be applied; if he sues in a court of the United States, the common law of the State as the judicial authorities of the United States declare it to be. Each tribunal will profess to decide by the same rule—the law of the State; but the federal court will really apply the common law of England, as it is generally understood to be, instead of the common law of that State as it is locally understood to be.

The relations between the federal and State courts which have been described obviously present many occasions for conflicts of authority. That such conflicts are so infrequent is mainly due to a spirit of comity, which the judges of each sovereignty should and generally do show to those of the other. The federal courts are also prohibited by Act of Congress from issuing any injunction to stay proceedings in a State court, except in certain cases arising under the bankruptcy laws. Independent of any statute, how-

¹ *Western Union Telegraph Co. v. Call Publishing Co.*, 181 United States Reports, 92. See Article on the Common Law of the Federal Courts, by Edward C. Eliot, *American Law Review*, XXXVI, 498.

ever, the general principles of jurisprudence forbid any direct attempt either by a court of the State to control the action of a court of the United States or by a court of the United States to control the action of a State court, except to the limited extent for which provision is made in the national Constitution.¹ Each court, this exception aside, exercises powers belonging to an independent sovereign, and therefore subject to control by that sovereign only.

The equitable jurisdiction of the courts of the United States enables them to interfere in disputes arising out of State elections in certain cases in which the claim is set up that rights held under the Constitution or laws of the United States have been violated. Actions for such relief are rare, and instances have occurred in which the remedy has been abused for political purposes.²

The centralizing and nationalizing tendencies which set in early in the nineteenth century and were so greatly strengthened by the course of events during and following soon after the Civil War have greatly weakened the position and influence of the State courts. They have thus rendered the State bench less attractive. In 1791, John Rutledge, an associate justice of the Supreme Court of the United States, resigned that office for the Chief Justiceship of South

¹ *Diggs v. Wolcott*, 4 Cranch's Reports, 179; *M'Kim v. Voorhies*, 7 Cranch's Reports, 279.

² See the proceedings in the case of *Kellogg v. Warmoth* in the United States Circuit Court in Louisiana in 1872. McPherson's "History of Reconstruction," 100-108.

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Carolina. During the last half century, several Chief Justices of States have resigned to become Associate Justices of the Supreme Court of the United States. Associate Justices of Supreme Courts in the smaller States have also frequently resigned to accept the position of District Judge, attracted by the life tenure, larger salary, and retiring pension.

CHAPTER XI

RELATIONS BETWEEN THE COURTS OF DIFFERENT STATES

EVERY State has all the rights of an independent sovereign, except so far as its sovereignty is limited by the Constitution of the United States. As respects each other the States are for most purposes in the position of foreign governments. The courts of one are regarded by those of any other as foreign courts, except so far as the Constitution may have prescribed a different rule.

No legal process from a court can have any inherent force outside of the territorial boundaries of the government in which it is issued. The law of that government may attach certain consequences to the fact of its service in a foreign country, but it can do so only with reference to the effect of the proceeding on persons or property subject to its own jurisdiction. Courts, as a general rule, can act only when they have jurisdiction over the person, the subject-matter, and the cause.

In rare cases, jurisdiction over the subject-matter may be regarded as giving jurisdiction over the person, so far as may be necessary to uphold a judgment settling the possession or title to property. Such a proceeding is, either in form or substance, one not *in personam* but *in rem*. The commonest instance is a suit in admiralty to enforce a maritime lien, such

as that given by the universal law of the sea for seamen's wages. Wherever the vessel is found, this lien is recognized and will be enforced by seizing and selling her, but only after some kind of public notice has been given to all who have any pecuniary interest in her to appear and be heard. In such a suit, personal notice to her owners, served within the jurisdiction of the government to the courts of which the seamen may resort, is not indispensable. The presence of the ship within the power of the court is enough.

While State courts have no admiralty jurisdiction, they can adjudicate upon a claim of title or right of possession to fixed property within the territorial limits of their State, although the parties adversely interested are not and have not been personally served with process there or anywhere. Here again their power over the property necessarily implies such power of control over those who might lay claim to it as will suffice to settle any dispute over its ownership or possession. But in all ordinary cases they are not only powerless to subject any one to obedience to their judgments who is not personally within the State in which they exist, but powerless so to subject one who is personally within it, but who did not belong there and was not there served with process in the original proceeding leading up to the judgment, unless he voluntarily took part in the proceeding.

In most civilized nations there is a recognized form of proceeding by which a judgment of a foreign court, fairly rendered after giving a proper opportunity to the defendant for a hearing, can be enforced by process from a domestic tribunal. This is styled making

the foreign judgment executory. The English common law did not recognize such a right, and gave no remedy to one desiring to enforce a foreign judgment, except that of bringing a fresh suit. In like manner, whoever has recovered a judgment against an inhabitant of any State, in a court held outside of that State, can enforce it against him in his own State only by bringing a new action. This either is, or is in the nature of, the common law action of "debt on judgment"; and only two defenses are available. These are, first, that no such judgment exists or is in force; and, second, that if it exists, it was rendered by a court having no jurisdiction over the subject-matter or the defendant.¹ If there was jurisdiction, it is of no consequence that it was erroneously or unfairly exercised. The remedy for that must be sought in the State where the judgment was pronounced. Even fraud on the part of the plaintiff in procuring it, though a defense against a judgment of a foreign country is not one against a judgment of another State.² These rules are established by Art. IV, Sec. I of the Constitution of the United States and by Acts of Congress passed to enforce it.³

Commercial intercourse between the different States is so great and so constant that questions in the courts of one often arise which turn on the law of another. Those who do any act do it with implied reference to the law of the place where it is done, so far as

¹ *Pennoyer v. Neff*, 95 U. S. Reports, 714; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. Reports, 287.

² *Christmas v. Russell*, 5 Wallace's Reports, 290.

³ U. S. Revised Statutes, Sec. 905.

respects its legal consequences. If it is a wrongful act there, it will in most instances be deemed a wrongful act everywhere. If it leads to a certain result as regards property rights there, it will ordinarily give a right of action anywhere, to secure the benefit of that result.

The law of each State is largely an unwritten common law. Even in those where they have full codes defining civil rights, these codes are expressed in terms for the definitions of many of which the common law gives the rule. But this common law is not precisely the same in any two States. In minor points certainly, and perhaps in capital ones, there will be a divergence. In England there is one uniform common law. Here, divided as we are for most business purposes into forty-five different sovereignties, it is multifarious.

If, then, the court of one State in determining the legal effect of a transaction having its seat in another must be governed by the common law of that State, where is it to be found? If there have been decisions of its highest courts in regard to what it is with reference to the point in question, they will ordinarily be accepted as conclusive.

This is not by virtue of the provision in the Constitution of the United States that full faith and credit is to be given in each State to the public records and proceedings of the others. That refers to the effect of public records and proceedings upon the rights of those who are or claim under parties to them. Such decisions as those which have been described are accepted as conclusive as to the rights of those who

were not parties to them, and simply because they are considered the best evidence attainable of a rule of unwritten law of general application. But they are not universally so considered. The rule that transactions are governed by the law of the place where they have their seat is one founded on the presumed intent of the parties to them. But in fact the parties to a business transaction act on their general notions of what the law is or must be, rather than on any particular knowledge of what courts have declared that it is. The rule that one country will accept the opinion of the judicial authorities of another as to what its law is, is one not to be pressed so far as to sacrifice essential justice. In this point of view, some courts hold that it is permissible to disregard decisions of other States which are based on a departure from what is generally considered a settled doctrine of the common law as to a commercial question. This is substantially the same position taken by the Supreme Court of the United States, and elsewhere described,¹ concerning the right of a federal court to refuse to be bound by State decisions as to the unwritten law affecting foreign trade or trade between the States.²

Another rule of practice of great importance is that in the absence of proof to the contrary the courts will presume, in a State basing its jurisprudence on the English common law, that the unwritten law of any other American State is the same as its own. As the reason of this rule fails in the case of Louisiana,

¹ See Chap. x.

² *Faulkner v. Hart*, 82 N. Y. Reports, 413, 423.

INTER-STATE JUDICIAL RELATIONS

Florida and Texas, which were subject to organized governments not derived from Great Britain at the time when they were incorporated into the United States, it is not applied to them.¹

Decisions of a court constitute a precedent of binding obligation only within the particular territorial jurisdiction which is subject to its process. In the tribunals of one State decisions rendered in another on legal points are, so far as respects transactions not governed by its local law, without any authoritative force. They may be read, just as the opinions of an author expressed in a legal treatise, or as the decisions of an English or German court might be, for what they appear to be worth. No formal proof that they were really the deliverances of the court from which they purport to emanate is necessary to support their use for this purpose.

The reported decisions of courts of other States, whether published officially or unofficially, may be cited in argument in any cause, to fortify the claims of counsel as to the proper rules to be followed in reaching a decision. For this use they are introduced simply for the intrinsic value of the reasoning and conclusions.

If it is claimed that they prove the law of the State from which they come to be of a certain nature (and that is a material point in the case), they should be made the subject of proof before argument.² In many States this is dispensed with by statutes allowing courts to take judicial notice of all reported decisions

¹ *Norris v. Harris*, 15 California Reports, 253.

² *Hanley v. Donoghue*, 116 U. S. Reports, 1.

in other States; that is, in effect, to take any means which they think proper to learn what they are. It is also the general practice of the bar where no such statutes exist to allow the reports of other States to be read for any purpose without objection.

Most States have statutes to facilitate the proof in court of the statute laws of other States. The mode prescribed by Act of Congress (Revised Statutes, Sec. 905) under the constitutional provision, to which reference has been made, involves considerable expense for the proper certification of copies. Common provisions of State legislation are that all courts may take judicial notice of the laws of other States (that is, take them into account without any formal proof at all), or that a copy of the official publications containing them shall be competent evidence of what they are.

There is a certain spirit of comity to which courts often give expression in rendering assistance to courts of other countries. This judicial comity has been defined as "the deference commonly paid by the courts of one jurisdiction to the laws or proceedings of another, in causes affecting rights claimed under such laws or proceedings."¹ As between courts of the different States in the United States this sentiment naturally is particularly strong. In pursuance of it, it is usual, if there has been a judicial appointment in one State of a representative of the law to administer an estate of any kind, part of which is in another State, for the courts of the latter to give him such further powers or appointment as may be necessary

¹ "Dict. of Philosophy and Psychology," *Comity*.

to put in his possession or control whatever is within their jurisdiction. An administrator of the estate of a deceased person would thus be appointed, almost as a matter of course, administrator of such estate in whatever State property or rights of action belonging to it might be found. A receiver appointed by a court of equity to take possession of property would ordinarily, in like manner, be appointed to the same office wherever any part of such property might be situated; and in some States such an officer has been permitted to sue for it under his original appointment. The general doctrine, however, is that a receiver in chancery (that is, a receiver appointed by a court of equity) is simply an arm of the court which appoints him, and has no authority to act outside of the territorial jurisdiction of that court.¹

A receiver of an insolvent corporation often finds that it has shareholders living in several different States, who have not fully paid in their subscriptions to its capital stock. In such case, if the statute of the State under the laws of which it was incorporated provided for the appointment of a receiver for insolvent corporations of that character, he may be regarded in other States as one to whom each shareholder, in legal effect, promised to pay such part of his subscription as had not been previously paid to the corporation itself. On this theory of liability, a foreign receiver has a right of action by virtue of his official position, indeed, but not because of authority from a foreign court to use that position for such a purpose. He sues as one to whom the shareholder

¹ *Hale v. Allinson*, 188 U. S. Reports, 56.

promised to make a payment, and on a direct contract between the two, which is implied by law.¹

The sentiment or rule (for from being a sentiment it has risen to be a rule) of comity between States both aids in the enforcement in one of rights acquired under the other,² and in the prevention by one of acts which would infringe on prohibitions created by the other. Thus, if a corporation of one State has been organized to do business in another, it may be enjoined in its home State from amalgamating with a corporation of the other, contrary to the public policy of the other as declared by its courts.³

As no legal process can be effective outside the limits of the sovereignty by authority of which it is issued, no court of a State can summon before it witnesses not found within its jurisdiction, who live in another State. This, in view of the free intercourse and trade between all parts of the United States, would work intolerable hardship had not statutes been passed by every State permitting testimony to be taken outside of its limits by written deposition for use in civil cases.

So far as criminal causes are concerned, this mode of relief generally cannot be pursued, owing to the common provision in our State Constitutions that the accused must be confronted by the witnesses against him. Most of the Northeastern States, to meet this difficulty, have passed statutes requiring their citizens

¹*Fish v. Smith*, 73 Conn. Reports, 377; 47 Atlantic Reporter, 711; 84 American State Reports, 161.

²*Finney v. Guy*, 189 U. S. Reports, 335, 346.

³*Coler v. Tacoma Railway and Power Co.*, 70 New Jersey Law Reports; 54 Atlantic Reporter, 413.

when summoned by a local magistrate at the request of a court of another State to appear and testify before it in such a prosecution, to do so upon receiving payment for their time and expenses, on pain of a considerable pecuniary forfeiture.¹

Lawyers of one State have no right to practice in any other. By courtesy and on motion of a member of the bar, it is customary for the courts of other States to allow them to participate in the conduct of any particular cause. In some States, lawyers who have removed their residence into them from another may in the same manner be admitted to their bar; in most there is a standing rule on the subject which requires proof of their having practiced in the courts of their original State for a certain number of years, and otherwise provides for an examination into their legal attainments.

¹New Hampshire inaugurated this legislation more than sixty years ago. Public Stat., ed. 1842, 382. Most of the statutes apply only to adjoining or neighboring States, and some require reciprocity on their part.

CHAPTER XII

TRIAL BY JURY

To have a trial by jury is, as a general rule, the right of every man who sues or is sued in court on a cause of action not of a kind to be disposed of in a court of equity or admiralty. The American colonies did not all adopt this mode of procedure at first, and few of them ever practiced it precisely on the English plan. In the colony of New Haven there were no juries. In all the New England colonies, later, there were juries, but verdicts in civil causes had not the conclusive force given them by the common law. The defeated party had what was styled the privilege of a review. This was a new trial before another jury, either in the same court or a higher one. If he lost **his** case again, it was the end of the litigation. If he gained it on the second trial, the other party could demand a third, and the event of that decided the cause forever.¹ In criminal prosecutions a similar right was sometimes conceded to the defendant in case of conviction.² South of New England there was no such radical departure from the common law, but there were before the Revolution variations of considerable importance.³

Instead of sending a case before an ordinary jury,

¹ *Bissell v. Dickerson*, 64 Conn. Reports, 61, 65; 29 Atlantic Reporter, 226.

² Statutes of Connecticut, ed. 1715, p. 131.

³ *The Federalist*, No. LXXXIII.

the court has power, at the request of the parties, to direct a special jury to be summoned to hear it. This is seldom asked or granted unless the matter in controversy is of peculiar importance and difficulty. Such a jury is more carefully selected, with the assistance of the parties, so as to make it sure that it will be composed of men exceptionally competent to decide a cause and such a cause. They are generally paid a larger compensation than ordinary jurors receive, the parties furnishing the additional sum required. Prepayment of these sums may be and often is made a condition of granting a trial before such a jury.¹

The requirement of unanimity on the part of the jury in civil causes, which we have inherited from England, is indefensible in principle. In practice, it has saved the institution from destruction. No one would feel himself safe if a majority of twelve men, of no special training in the study of legal rights, could strip him of his property. But among that number of persons there can hardly fail to be one or two of superior character and intelligence. These, with the aid of the judge, if he be one who fulfills properly his part of the proceeding, can generally lead the rest to a just conclusion. If the verdict is for the plaintiff, they may have to yield to some compromise as to the amount of damages. Not infrequently this has been arrived at by calling for the separate estimates of each juror, adding them together and dividing them by twelve. It is a rough way, and not the

¹ *Eckrich v. St. Louis Transit Co.*, 176 Missouri Reports, 621; 75 Southwestern Reporter, 755; 62 Lawyers' Reports Annotated, 911.

fairest, but the wiser heads may consent to it to secure the concurrence of the weaker.

In criminal cases, the importance of a verdict to the defendant is so great that unanimity may well be required. While there is a legal presumption that he is innocent until found guilty, this in practice is of little avail to him with the jury. They know from their every-day observation of affairs that there are few prosecutions which reach the final stage of a trial on the merits, under which there ought not to be a conviction.

In several States verdicts in civil causes by a three-fourths vote are permitted. This radical change is not likely to become general.

Its best defense is that temptations to corruption are thus removed. So long as one juror, by refusing to concur with the rest, whether with or without reason, can prevent a verdict, there will be defendants seeking to prevent the recovery of what they know to be a just demand, who will be ready to buy a vote. In 1899, seven of the bailiffs in attendance on the Chicago courts were accused of lending themselves to such negotiations, and twenty men who had been jurors confessed that they had either taken or been offered bribes.¹

The Anglo-American jury is unique because it is nothing unless unanimous, and because it may render a general verdict, stating no reasons for the decision, on which a general judgment, save in exceptional cases, is entered as of course.

In the early judicial history of the American

¹ Report of the New York State Bar Association for 1904, 51.

colonies juries were less under the control of the judge than they are now.¹ In some colonies they received no instructions as to the law, the chance of an unjust decision being guarded against in civil cases, as previously stated, by an absolute right in the losing party to claim a new trial before another jury.

The general tendency of judicial practice in later years has been to emphasize the influence of the judge upon verdicts. This often extends to directing a verdict, peremptorily, for one party or the other, when the law is clear upon the facts claimed or admitted. Still more often it takes the shape of a caution as to the weight that can properly be given to certain testimony, or an opinion as to what really are the controlling sources of evidence. Without the guidance of an intelligent judge, a jury would frequently come to unfortunate and even unjust conclusions. That there should be such guidance is an essential part of the jury system, and it is generally given most effectually where the judges are the ablest and the most independent.

The judge has at common law and by practice in most American States a right in his charge to comment on the evidence and intimate his opinion as to the weight which should or should not be given to any particular testimony. It is a right to be cautiously exercised, for juries are greatly influenced in their conclusions by remarks of that character. They feel that he is the head of the court, and there is a certain sentiment of loyalty to him as well as of respect for any one occupying the position in which they find him

¹ See Chap. xiv.

placed by the authority of the State. Sometimes this power is abused. The judge desires to indicate a decided opinion. He fears that if he put it in plain words it might seem so strong as to indicate partiality, and furnish ground of appeal. He therefore uses language, perhaps in reference to the credibility of a witness, which looks fair and even colorless on paper, but by the tone or emphasis in which some vital word is uttered, or with the aid of a shrug or glance, carries to those whom he is addressing an unmistakable conviction that he means it to be taken in a certain sense. Any such judicial action, however, is rare, and would be looked upon with disapprobation by the bar.¹

If the case is one which has been pressed by counsel especially upon the sympathies of the jury, such as a suit arising out of a labor strike, or by a widow to recover for an injury resulting in her husband's death, it is customary for the court to caution them in their charge that justice and not sympathy is their rule of duty.²

The American colonies were settled at a time when the English criminal code was extremely harsh, and the English judges were disposed to administer it in such a way as to favor the crown. If the government promoted a prosecution, there was little hope for the defendant, except from the jury. The courts held that on criminal proceedings for publishing a libel it was for them to say whether the paper was libellous, and

¹ See *Metropolitan Life Insurance Co. v. Howle*, 68 Ohio State Reports, 614; 68 Northeastern Reporter, 4.

² *Bachert v. Lehigh Coal and Navigation Co.*, 208 Pennsylvania State Reports 362; 57 Atlantic Reporter, 765.

for the jury to decide only as to its publication by the accused. This was the occasion of the Charles James Fox Libel Act of 1792, and of many constitutional provisions to the same effect in this country, under which juries, even in libel cases, can render a general verdict of Not Guilty.

It was under the influence of these ideas, and in view of the fact that the colonial judge often knew no more law than the jury, that it became common in this country either to give a jury in a criminal cause no instruction as to the law at all or to charge them that they were judges both of the law and fact.¹ In some of the States, a charge to the effect last stated is now sometimes required by statute.

A jury trial is a poor mode of doing justice, if there is a rule of law which, as applied to certain facts, should control the verdict, unless that rule of law be both stated by the judge, and so stated as to impress upon the jury that it is their sworn duty to apply it, if the facts which they may find to exist are such as to come under its operation. That they should be so instructed, even if declared by express statute to be the judges both of the law and the facts, is the prevailing opinion of American courts and jurists.²

It is of especial importance that the duty of juries to take the law from the court should be clearly stated to them in a country of written Constitutions. Most crimes are defined by statute. It is easy for the defendant's counsel to claim that the statute on which

¹ 2 Swift's "System of the Laws of Connecticut," 258, 401.

² *Commonwealth v. Anthes*, 5 Gray's Reports, 185; *Sparf v. United States*, 156 U. S. Reports, 51, 71.

the prosecution is based is unconstitutional. If it be, the accused is entitled to an acquittal; but if the jury acquit him on that ground, and the ground is false, injustice is done. Any such claim must be disposed of by the court, in order to give the Constitution its due supremacy.¹

Mr. Justice Baldwin of the Supreme Court of the United States came to the bench, in 1829, strongly inclined to minimize the power of the federal judiciary. In one of his first cases on the circuit, he charged the jury in a capital case that they were judges of both law and fact, and if they were prepared to say that the law was different from what he had stated it to be, were not bound by the opinion of the court.² It was not long before he found himself compelled to retreat from his position. A man was being tried before him for forging notes of the United States Bank, and his counsel claimed an acquittal because the law incorporating the bank was unconstitutional, reading to prove it the veto message of President Jackson, with the accompanying documents. To the Jackson Democrats on the panel this was quite an imposing argument, and Mr. Justice Baldwin was obliged in his charge to sound the warning that for a jury to exercise the power of treating an Act of Congress as invalid was virtually to give us a country without a Constitution and without laws.³

¹ *State v. Main*, 69 Conn. Reports, 123, 132; 37 Atlantic Reporter, 80; 61 American State Reports, 30.

² *United States v. Wilson*, 1 Baldwin's Reports, 109.

³ *United States v. Sheve*, 1 Baldwin's Reports, 510, 513; *Pennsylvania Law Journal* for November, 1846, p. 9.

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In one of the Southern States where it is a statutory right to demand instructions that the jury are the judges of the law, it was the custom of a certain trial judge of commanding presence, when called upon to give them, to say to the jury after he had done so, rising to his full height, "But, gentlemen, you must recollect that I have told you what the law that governs this case is, and to this I am the only witness who has appeared or could appear."

It was one of the acute observations of Alexander Hamilton that under our American Constitutions judges are less to be relied on by one who is attacked by the government, because those who direct the government are the choice of the people, and whatever they do is presumably popular. The judiciary, he said, was less independent here than in England, and therefore we had the more reason to cling to the trial by jury and their power to render general verdicts as our greatest safety.¹

The States which guard these most closely are those in which there is the most jealousy of anything like a standing order, and the widest scope of popular election. Georgia was the State, among the old thirteen, in which these characteristics were most marked. Her first Constitution of 1777 expressly threw the power of determining the law into the hands of the jury in every case, though they were allowed to ask the judges holding the court for their opinion, in which case each judge gave his in rotation. The party who lost his case could demand a new trial before a special jury. The ordinary jury were to be sworn

¹ *People v. Croswell*, 3 Johnson's Cases, 337, 353.

to bring in a verdict according to law and the evidence, provided it be not repugnant to the Constitution. The special jury were to be sworn to bring one in according to law and the evidence, "provided it be not repugnant to justice, equity, and conscience, and the rules and regulations contained in this Constitution, of which they shall judge." Apparently the meaning of this was that while the decision of the first jury as to the law could be revised by a second, that of the second, however contrary to the highest law, could not be.

Resort is occasionally had to the assistance of a jury by a court of chancery for the better disposition of some disputed question of fact on which the equities of the parties depend. This cannot (except by force of some express statute) be claimed as a matter of right. The judge sends the issue to a jury for trial only if he thinks it would be helpful to him, but their verdict has no conclusive effect. He can adopt it or ignore it, at his pleasure.

The selection of jurors is a long process. The general plan is to commit to some local authorities in each city, town, or county the choice of a considerable number out of the inhabitants whom they may think suitable to serve in that capacity; then to have that list revised by some higher officials or persons specially appointed by the courts for the purpose, who must strike out a large part of the names; and finally to have those who are to be summoned to attend any particular term of court for jury duty chosen by

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drawing from the remaining names by lot. In many States special qualifications as to age, education, and intelligence are required. Out of the jurors thus summoned to attend the court, there is a further choice by lot of those to try each particular case, subject to objections made by either party to any thus drawn, for proper cause.

The statutes of the United States provide that jurors in the Circuit and District Courts shall be selected in each State from those qualified to serve in its highest trial courts, and in substantially the same manner.

The right to a jury trial is in civil actions often waived by both parties, in which case the facts as well as the law are determined by the judge. If not expressly claimed, it is by the rules of practice in some States treated as waived. The number of civil causes tried to the jury, taking the country as a whole, is declining. The decline is generally found to be quite accurately proportioned to the confidence felt by the bar in the ability and independence of the judge,¹ or perhaps to that confidence in the case of a former generation. Tradition and custom have a large influence on whatever pertains to the practice of law. In several of the States a majority of the civil causes which might be tried to the jury are not: in Louisiana very few are.² The tendency in England is also toward dispensing with the jury in ordinary civil

¹ See Paper by Justice Henry B. Brown, in the American Bar Association Report for 1889, p. 265, on "Judicial Independence."

² See Chap. xxiv.

trials. Over a million cases are brought every year in the English county courts, and in not one in a thousand of them is there a jury trial, although if the matter in demand is over £5 in value either party may claim it.¹

Criminal trials, except in case of trivial offenses, it is generally necessary to hold before a jury, by express provisions of the Constitution.² During the colonial era the defendant was allowed in Massachusetts to waive a jury, even in capital cases.³ Statutory permission to the same effect has since been given in some States where there is no constitutional provision to the contrary.⁴ In civil causes, the right to demand a jury in petty cases has been restricted in a number of States.⁵

At common law the judges were accustomed and allowed to put great pressure upon juries, if necessary, to force them to unite in rendering a verdict. They could be kept together without food or beds all night, and even carted about from one court town to another until they were ready to report an agreement. Very little of this practice remains in the United States. In some States they are allowed to separate and go to their homes at night during the trial even of a capital

¹ Maitland, "Justice and Police," 28, 29, 54. For small cases the jury is one of five, but their verdict must be unanimous.

² See Cooley, "Constitutional Limitations," 389.

³ Proceedings of the Colonial Society of Massachusetts, VI, 95.

⁴ *State v. Worden*, 46 Connecticut Reports, 349.

⁵ In New Hampshire, for instance, a constitutional amendment was passed in 1877 denying it in cases involving less than \$100, unless title to land is involved.

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case, and while deliberating over their verdict they are generally supplied with food and other comforts.

The right of trial by jury was limited at common law to trials of what are called "issues of fact;" that is, of the truth of a statement of material facts made by one party and denied by the other. If, therefore, in a civil cause a judgment has been ordered for the plaintiff without a verdict, as where the defendant has failed to appear and answer, it is for the court to say for the recovery of what amount of damages the judgment shall be rendered. It may inquire into this by the aid of a jury, but such a jury need not consist of twelve. The inquiry may also be conducted by the judge alone.¹

In most of our States this common law practice has been abandoned, and damages, in cases of the kind above described, would be assessed by a jury of twelve. This is because otherwise a defendant who did not dispute his liability for the act complained of and only wished to reduce the amount of damages claimed in the writ might, after declining to appear and plead, come forward with a motion to be heard by the court on the question of damages. A motion of that kind would naturally be granted, and the effect would be to transfer the decision of the only actual controversy between the parties from a jury to a judge. In Connecticut the old practice was maintained until 1907, and the courts held that on the hear-

¹ *Dyson v. Rhode Island Company*, 25 Rhode Island Reports; 57 Atlantic Reporter, 771.

ing as to the damages, in actions where there had been no contract between the parties to fix the rule of assessment, the defendant might show, if he could, that only nominal damages should be given, because really the plaintiff had no cause of action at all.¹ The result was that many suits arising out of railway accidents in that State were brought against the company in fault in other States in which process could be served to compel its appearance, and where a full jury trial could be secured. The legislature finally interposed and gave the plaintiff a right to claim a trial by jury, notwithstanding a default.²

¹ *Lennon v. Rawitzer*, 57 Conn. Reports, 583; 19 Atlantic Reporter, 334.

² Public Acts of 1907, 665.

CHAPTER XIII

FORMALITIES IN JUDICIAL PROCEDURE

THE sessions of a court of record of general jurisdiction are daily opened by a formal proclamation made, at the command of the judge, by the crier or sheriff's officer in attendance. In many States the ancient English style of expression has been preserved, which dates back to the Norman conquest, and begins with a cry of "*Oyez, Oyez, Oyez.*" These proclamations are often closed with such words as (for instance) "God save the Commonwealth of Rhode Island and Providence Plantations." The adjournment from day to day is announced in a similar but less elaborate manner.

Many courts hold a certain number of stated "terms" annually, the first day of which is fixed by statute, and each of which is adjourned whenever the business that may come before it is finished, lasting sometimes but a few days and sometimes months. In a number of States such terms are opened by prayer offered by a minister of religion, invited in for the purpose by the sheriff or court attendant. No regular chaplain is employed, and one term may be opened by a Presbyterian minister and the next by a Roman Catholic priest.

In some of the smaller counties in Massachusetts

the sheriff or his deputy daily escorts the judge to and from the court house, in accordance with what has been the usage from colonial times.

Formerly it was the practice in New England to ring the bell of the principal church in the town daily at the hour when court opened.¹

In many courts it is the custom for all present to rise on a signal from the sheriff or marshal when the judge enters the court room to take his seat on the bench. This is the general usage in the federal courts and in the appellate courts of States. In the latter a formal proclamation is often made by the sheriff to announce the coming of the judicial procession, concluding with a "God save the Commonwealth." In some States formal bows are interchanged between bench and bar as the judges take their places, after which the court is opened by the customary proclamation and the bar then requested by the judges to resume their seats.

The rules of official precedence are strictly observed in appellate courts. In entering the court room the chief justice advances first, and his associates follow in the order of the dates of their commissions, the senior associate justice taking his seat on his right, the second in seniority on his left, the third in seniority on the right of the senior associate justice, and so on; the junior in commission occupying the end seat on the left of the bench.

The members of the Supreme Court and of the Circuit Court of Appeals of the United States have always

¹ This was continued in Connecticut until the last quarter of the nineteenth century.

worn black silk gowns. The members of the Supreme Court of South Carolina have worn them from a time antedating the Revolution. The New York Court of Appeals in 1877, at the request of the bar, preferred through David Dudley Field, adopted the practice,¹ and the same thing has since been done by appellate courts in several other States. In one of these, Massachusetts, they had been worn in the colonial era. About 1760, Chief Justice Hutchinson introduced gowns and cassocks there on the Supreme bench, and also gowns, bands, and tie-wigs for lawyers who were admitted as barristers of the Superior Court.² The latter soon abandoned these, but gowns were retained by the judges until 1793.³ In North Carolina gowns and bands were worn by the members of the Supreme Court in 1767.⁴ In New Jersey, the bar were at one time required to assume them by a rule of the Supreme Court, but the rule was vacated in 1791.

At the first opening of the Supreme Court of the United States, in 1790, Chief Justice Jay wore a gown with salmon-colored facings on the front and sleeves, of the style then used by Doctors of Laws created by the University of Dublin, from which he had received that degree.⁵ It has not since, in that or any other American court, been the practice for judges to

¹ In 1903 it was extended to *nisi prius* courts held by justices of the Supreme Court.

² "Life and Works of John Adams," II, 133, note, 197.

³ Publications of the Colonial Society of Massachusetts, V, 22; Amory, "Life of James Sullivan," I, 261, note.

⁴ Proceedings of the Colonial Society of Massachusetts, VI, 389.

⁵ 134 U. S. Reports, Appendix.

wear academic hoods or other decorations on the bench.

Counsel, in addressing the court, rise and begin with "May it please the Court," "May it please your honor," or, before a court in banc, "May it please your honors." The term "you" would never be used to a judge on the bench; but that of "your Honor" would be employed.

Great pains is taken by the officers in attendance to prevent anything on the part of the audience that could in any way disturb the proceedings, such as loud conversation or unnecessary moving from place to place.

There is a good deal of antique form in the manner in which, under the direction of the clerk, prisoners are arraigned and juries are made up or "impanelled" for the trial of a cause.

In charging a jury, the judge commonly rises and the jury do the same.

When sentence is pronounced on a conviction for crime the prisoner is required to rise. In cases of capital offenses, he is asked by the judge if he has anything to say why judgment of death should not be pronounced against him. It is highly improbable at that stage of the cause that he should have anything to urge which has not been already considered, but the ancient English practice in this respect is still followed, for it is not absolutely impossible that something may have occurred since the verdict that would affect the judgment.

CHAPTER XIV

TRIAL COURTS FOR CIVIL CAUSES

THE great bulk of litigation is confined to the civil trial courts, that is, to courts for the trial of ordinary causes between man and man. It also has its seat in the trial courts of the States, for not only is the judicial power of the United States confined by the Constitution within narrow limits, but these have been made still narrower by the action of Congress from time to time.

Most lawsuits never get to trial. The defendant generally has no defense, and is well aware of it. The suit is brought to obtain security or force a settlement. He employs no lawyer and lets things take their course. The result is a judgment against him for default of appearance; for if one who has been duly summoned to court to answer to a demand fails to attend and answer, the court assumes that there is no answer that he could make, and disposes of the cause on such evidence as the plaintiff may produce. On the other hand, the plaintiff often does not care for a judgment. He has become satisfied that, if he got one, he could not collect it, or he has availed himself of the suit to secure a compromise of the matter in demand on satisfactory terms. In such case, or if, after bringing an action, he becomes convinced

that he cannot maintain it, he withdraws it, or if the defendant insists, suffers a judgment to go against him, called a nonsuit.

In some States the writ or process by which the action is begun must be accompanied by a full statement of the particular nature of the plaintiff's claim. In others this is not required, and such a statement is only furnished when specially ordered by the court. If the case goes to trial on the merits, it will be on such a statement furnished by the plaintiff, and on some paper filed by the defendant by way of answer. Occasionally these pleadings, as they are called, are such as to call out further statements or claims by way of reply and rejoinder. Their form is now generally regulated by statutes, and is much the same in most of the States, being based upon a system known as "Code Pleading," which originated in New York about the middle of the nineteenth century. It is simpler and less technical than the system under the common law which it replaced.

If the defendant has any objections to the maintenance of the suit, on such a ground as that it is brought in a wrong court, or a wrong way, these are first disposed of. Then, if he asserts that the plaintiff on his own showing has no case, or if the plaintiff asserts that the defense set up is insufficient on its face, this being a question of law, the judge decides it without the aid of a jury. When, however, the facts are in dispute, a jury must be called in, if either party claims it, in an action not of an equitable nature, when the matter in controversy is one of any considerable amount.

In this country we adhere to the old common law

mode of taking exceptions to the legal sufficiency of written pleadings. This was by filing a paper called a "demurrer," in which the particular objections were set out, unless, as was frequently the case, they were so fundamental as to be apparent at the first glance. In many States, however, the objections must always be particularized. In England demurrers are no longer used. Her Judicature Act of 1873 put an end to the common law system of pleading, reconstituted her whole method of judicial procedure, and authorized the judges to make rules and orders from time to time to adopt the new scheme to convenience in practice. One of their orders, passed in 1883, abolished demurrers. In place of them, the party desiring to have the benefit of points of law arising on the face of the pleadings may state his point to the court and ask to have it set down for separate argument before proceeding to a trial of the cause on the facts. American lawyers are not satisfied with the reasons which led to this change. They were that the old practice made it a matter of right to claim a special hearing on a law point, while the new order would leave it to the discretion of the judge. The English judges are few and able. Such a plan may work satisfactorily under their administration, but it might often lead to useless delays and expense if introduced in a country where judges are so numerous and of such different qualifications as is the case in the United States.

Our trial courts are now generally held by a single judge. Until the latter half of the nineteenth century it was not uncommon to have three judges sit together in county or city courts. One of them would be a

lawyer and the others not.¹ In cities the two side judges were generally aldermen. A tribunal thus constituted is better adapted in some respects to trying questions of fact than a single judge. It is a jury of three acting by a majority. But for the conduct of a jury trial it is unwieldy, slow-moving and uncertain. In most cases any question of law or legal practice will be virtually decided by the presiding judge, but he will usually pause to go through the form of consulting his associates. Occasionally they will overrule him, and in such case it will be apt to be by a misunderstanding or misapplication of law. The expense of three judges, however moderate the compensation, has also weighed in favor of an abandonment of the system. It naturally results in paying too little to the chief judge, and too much to the others; and always costs more than it would to pay one man a sufficient salary.

We have not the need of several judges to hold a trial court, which is felt in many countries. They use them for a purpose which our juries supply. For similar reasons Americans have not seen any occasion for organizing special courts, such as are the German *Gewerbegerichte* and *Kaufmannsgerichte*, to try special classes of causes. A jury of twelve will be apt to contain some men who will adequately represent those interested in any ordinary industrial or commercial controversy.

Petty suits not of an equitable nature must generally be brought before a justice of the peace, who disposes of them himself, both as to matters of evidence

¹ See Chap. VIII.

and fact, but subject to an appeal to a higher court in which a jury trial can be had. In some States he can summon in a jury of six and leave the facts to their determination. The pleadings before him are usually in the same form as in the higher courts.

In jury trials of civil causes the judicial function is, so far as possible, divided into two distinct parts. All questions of pure law are decided by the judge alone. All questions of pure fact are decided by the jury alone. All questions turning on the application of the law to the facts are decided by the jury under instructions from the judge as to what applications of the law it would be competent for them to make under the particular circumstances which they may find to have existed. The judge also has a large discretionary power in minor matters arising in the course of the suit. It is for him to say when it shall be tried; whether the written pleadings are in proper shape, and if not whether they may be amended; and in what order and within what limits the evidence may be introduced.

No countries in the world have so artificial a set of rules of evidence as England and the United States. This is because in no other country is the right to a jury trial so extensive. Many of these rules date back to the early history of the English common law. It was a time of general illiteracy. The ordinary juror could not read or write. His powers of reasoning and discrimination had had little or no cultivation. It was thought dangerous to allow him to listen to any evidence that was not of the clearest and best kind. It was thought necessary to bring all witnesses in per-

son before him and let him hear their voice and look into their faces in order to give him the fullest possible opportunity to determine whether their testimony was worthy of credit. But while our rules of evidence were devised for jury trials, they are applied with equal rigidity in all trials. A jury may be waived; a single judge may hear the cause; and yet he must rule out of consideration whatever would have been inadmissible if it had been made the subject of a jury trial.

Much that in other countries is helpful in reaching a just conclusion is in this manner shut out in American courts. A man of the highest character, for instance, may say before twenty listeners that he saw a certain person shoot and kill another, and state how the whole thing happened. The person thus accused is sued for damages under a statute permitting such a remedy by the representatives of the man shot. Before the trial the witness of the act dies. He was the sole witness. There is no other testimony to be had. Under our system of practice, those to whom the statement was made cannot be allowed to testify to it. Such testimony would be "hearsay." It would put before the jury two questions, first whether such a statement was really made, and then whether, if made, it was true. The law of evidence says that they ought not to be perplexed by questions upon questions.

The tendency of American legislation of late years has been strongly toward removing some of these artificial bars to getting at the truth. The common law thought it dangerous to allow a jury to hear any witness not under oath, nor under such an oath as implied his belief in the existence of a God, or any witness

having a pecuniary interest in the event of the cause. An atheist or an agnostic could not testify. The plaintiff and the defendant could not. These restrictions have been almost everywhere repealed.

The trial judge has also, and necessarily, a large discretionary power in excluding testimony which has only a remote bearing on the case, and in limiting or extending the examination of a witness so as on the one hand to prevent needless repetition, and on the other to get out the truth and nothing but the truth. He has similar authority to restrain the arguments of counsel within reasonable limits.

A trial judge suddenly called upon to make a ruling on some point of law in the progress of a trial may make a wrong one. If so, he may have an opportunity to correct it at a later stage of the proceeding. He has admitted evidence which should have been excluded. In his charge to the jury he may instruct them to disregard it, and his error will thus be cured. He has excluded evidence which should have been admitted. Before the case is closed he can change his ruling and allow it to come in. But so long as any ruling stands unchanged, whether it is in accordance with law or not, it is the law of the case for the purposes of the trial. Counsel may endeavor to procure a reconsideration of the question, but they cannot ask the jury to adopt a different view from that taken by the judge. Their only remedy is by a motion for a new trial, after the verdict, or proceedings in error before a higher court.

Trial courts generally sit during a greater number

of hours in the day than appellate courts. This is particularly true when they are held for short terms in a country shire town. In the larger cities where they sit during a large part of the year they generally have established hours from which they rarely depart, such as from ten in the morning to five in the afternoon, with a recess of an hour for lunch or dinner. Formerly nine o'clock was a more common hour for opening court. In New York in 1829 the sittings were from eight to three, when there was a recess of two hours for dinner, and then from five till some time in the evening, occasionally as late as ten.¹

The modern tendency everywhere is toward a shortening of the hours of daily session, especially when an official stenographer is employed.

The clerk keeps a docket-book in which each case returned to court is entered and numbered. The entry reads thus :

John Doe
Smith
vs.
Richard Roe
Jones.

Doe is here the plaintiff and Smith is the attorney who brought the suit for him. Roe is the defendant and Jones is the attorney who appears in his behalf. If there be more than one party on either side the words *et al.* will be added, signifying as the case may be, *et alius*, *et alii* or *et alium*, or should there be three

¹ Kennedy, "Memoirs of William Wirt," II, 221.

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or more defendants, *et als*, signifying *et alios*.¹ From this docket trial lists are made up for each term or session of court. Assignments for trial are sometimes made by the court and sometimes arranged by the bar subject to the approval of the court. Several cases are commonly set down for each day, so that if one falls out another may be ready, and in every case so assigned the parties must be prepared at their peril to appear and proceed at any minute when called upon.

In courts having a large docket of cases it is customary to set apart one day in the week for the disposition of incidental motions and for arguments on points of law.

When a case is called for trial the plaintiff's counsel opens by stating its nature and the main facts as set out in the declaration or complaint which he expects to prove. Sometimes the pleadings on both sides are read at length. The plaintiff's witnesses are then examined orally, after the examination of each an opportunity being given for his cross-examination by the other party. The testimony of witnesses whose attendance cannot be had, which may include any living out of the State (or, in the federal courts, over one hundred miles from the place of trial), or who are infirm or sick, may be secured by previously taking it down out of court in the form of a written deposition, under oath, before a magistrate. In such case the ad-

¹ Another book is kept for criminal cases, which are docketed in some States as "The State *v.* John Doe," in others as "The People *v.* John Doe," and in the federal courts as "The United States *v.* John Doe."

verse party must have such notice as to enable him to be present and cross-examine the deponent, or to file written cross-interrogatories. Depositions are received in the same manner and subject to the same objections as oral testimony. In cases in equity a considerable part of the testimony is generally presented in written form, either by depositions of the kind described or certified by a special officer appointed by the court for the purpose, who may be called an "examiner."

When the plaintiff's case has been thus presented, his attorney announces that he "rests." The defendant's attorney then states what he proposes to prove, and produces his evidence, at the close of which the plaintiff has the opportunity to meet any testimony so produced as to points not covered by the plaintiff's case as presented "in chief," by rebutting testimony. Should there be any new point brought out in the latter which the defendant had not anticipated in presenting his case (which rarely happens), he may now be allowed to introduce further testimony as to that.

At the close of the evidence the plaintiff's counsel argues for his client; the defendant's counsel replies; and the plaintiff's counsel is then heard in answer to anything which has been said in behalf of the other side.

If the trial has been had before a judge without a jury he then commonly takes the written pleadings and makes up his decision at his leisure; but if the case is plain may give final judgment on the spot.

If the trial has been before a jury the parties argue

as to facts in dispute to them, but as to the law upon these facts to the court.¹

In some States the arguments on the latter question are made before those on the former, and written requests or "prayers" for instructions to the jury as to the law are submitted to the court, upon which it passes before the jury are addressed. In most States there is no such division of argument; judge and jury are addressed in turn during the same speech, and counsel first know what view of the law is taken by the court when the judge gives his final charge.

In every jury trial, after all the evidence is in and the arguments concluded, it is the duty of the court to instruct the jury as to what the precise controversy is and what disposition of the cause it would be permissible for them to make. If in view of facts which are undisputed by either party there can be in law but one conclusion, the judge should direct them to render a verdict accordingly. But if the facts might fairly be found as they are claimed to be by either party, he instructs them as to the law applicable to the facts so claimed by each. He can, at common law and by the practice in most States, give his own opinion as to the weight of evidence on any point in controversy.

The common law requires unanimity on the part of the jury before they can return a verdict. If it cannot be had they report a disagreement, and the case stands over for another trial.

If they agree upon a verdict, it must, to be effective, be accepted by the court. This acceptance is ordi-

¹ See Chap. XII.

narily a matter of course, but if the verdict is plainly contrary to the evidence or to the law as laid down in the charge, it may be set aside and a new trial ordered. If it gives damages which are plainly excessive, the judge may set it aside, unless the prevailing party enters a *remittitur* of a certain amount, that is, formally stipulates on the record that the verdict shall stand only for such sum as the judge may have thus indicated to be what seems to him to be the utmost limit that ought to be allowed. In some States, if the verdict is unsatisfactory to the judge, though not so manifestly against the evidence that he would be justified in setting it aside, he may return the jury to a second consideration of the cause.

When a verdict is accepted judgment is rendered in accordance with it. To this rule there are, however, certain exceptions. It sometimes happens that a verdict is returned for a plaintiff whose case as stated in his pleadings is one which in law is no case; the defendant having failed to take this objection and made his contest only on the facts. He then can ask the court not to render any judgment upon it. This is technically called a motion in arrest of judgment. Again, the verdict may be rendered, by reason of the state of the written pleadings, on some immaterial point, in favor of one party, when there are other points of controlling importance in favor of the other, on which it has been admitted that he is in the right. In such case the party against whom the verdict is rendered may ask for judgment in his own favor notwithstanding the verdict.

Verdicts are ordinarily given directly for the plain-

tiff or the defendant. Printed blanks for such verdicts, one headed "plaintiff's verdict," and the other "defendant's verdict," are often handed to the jury when they retire, to choose from according as they may find the facts. Such a verdict is called a general verdict. Occasionally one of a different form is returned at the request of counsel and by the permission of the court. This is termed a "special verdict," and sets forth the particular facts as found by the jury in detail, without finding the ultimate issue for either party. This is only proper when such a finding would have been simply a legal conclusion from these facts. A special verdict leaves it to the court to apply the law and render judgment as that requires.

In many causes the testimony is all taken out of court, before some officer or arm of the court, who only reports his conclusions from it as to the matters in controversy. This is a common practice in equity, the case being sent to a "master in chancery" for this purpose. In cases of a common law nature the consent of both parties is generally required; but with that any cause may be disposed of before an arm of the court commonly termed an "auditor," "referee" or "committee."

The report of such a hearing sometimes is confined to the facts which are found to have been established. In other cases it may extend to a provisional decision of questions of law arising on those facts. The ultimate decision of any question of law is always for the court, and if it accepts the report it is its duty to draw the proper legal conclusions from the facts established. As to whether the report shall be accepted, and as to

the legal questions arising upon it, the parties have a right to be heard in court. Improper or irregular conduct on the part of the officer making the report may be shown as a cause for rejecting it. If it is accepted the facts found generally stand as conclusively established.

Equity causes are generally tried before a single judge, who decides all questions both of fact and law, proceeding in the same manner as in a common law cause in which a jury has been waived.

CHAPTER XV

PROBATE COURTS

THE English common law regarded wills of lands as in the nature of conveyances, the due execution of which, if ever called in question in a lawsuit, was to be established then and there; but if never so called in question, need never be established at all by any judicial proceeding. Wills of personal property, on the other hand, were to be proved as soon as might be before an ecclesiastical court, and unless so established were ineffectual.

This difference in the treatment of the two kinds of wills was due to the legal principle that so far as personal rights and obligations were concerned the personality of the dead was, after a certain fashion, continued in existence by attributing personality to their estates. These were to be administered by some one as the "personal representative" of the former owner. This personal representative discharged his personal obligations so far as there might be personal estate or rights of property sufficient for the purpose. He was styled an executor if designated by will; an administrator if there were no testamentary appointment. A man's lands, however, went upon his death straight to his heirs unless he had by will conveyed them to some one else. That when

he died they were part of his estate did not charge them with the fulfillment of his personal obligations. For the discharge of these the creditor must resort to his personal representative. His heirs occupied no such position.

The administrator was always appointed by an ecclesiastical court and rendered his accounts to it. Long use and the existence of a State church with a regular judicial establishment, made such a system tolerable to the English people; but the new conditions under which those of them came who planted the American colonies made it both intolerable and impossible here.

While most of the colonies had an established church, none had bishops' or bishops' courts. The bishop of London claimed a certain jurisdiction over all, but in none was it recognized as extending over the estates of the dead. In the Crown colonies the instructions to the Governors generally referred to it as sanctioned by the government but not as extending to the probate of wills. Some of the Governors were given *ex-officio* full probate powers.¹

The same considerations which early led to the general adoption of a recording system for deeds of land in all the colonies extended to wills, since they also might convey it. Such records, to attain their purpose, had to be public in the fullest sense. Nothing was allowed to go upon them which had not some kind of authoritative sanction proceeding from the State.

¹ "The American Jurisdiction of the Bishop of London," Transactions of the American Antiquarian Society, Vol. XIII, 188, 194, 197.

Deeds were first to be acknowledged before a magistrate. As to wills, the practice finally came to be to require them to be established once for all as the act of the testator by a court invested with special jurisdiction for that purpose, and also over all estates of those who die leaving no will. This, if organized for that special function particularly, is ordinarily styled a Court of Probate, occasionally a Surrogate's Court or Orphans' Court. It is sometimes given, and sometimes not given, a certain authority over the real property within the State while the estate is in settlement.

All real estate left by a decedent is ordinarily made, by statute, liable for his debts in case of a deficiency of personal property, except so far as it may be charged with a right of dower. Even if it has gone into the possession of an heir or devisee, the proper Probate Court can order its sale for this purpose, if it should appear on the allowance of the administration account to be necessary.

The formal establishment or "probate" of a will does not affirm the validity of its provisions. It simply adjudges the instrument to be a will legally executed by one competent to make it and who had a home or property within the territorial jurisdiction of the court. Commonly, if not universally, an opportunity is given, either in the first instance or by appeal to a higher court, to have these questions tried before a jury.

The succession of particular persons to the property of the dead is not a matter of natural right. It rests upon positive law and is regulated by the authority of

the government at its pleasure.¹ Probate procedure is therefore wholly determined by local legislation and practice.

In many States, probate jurisdiction belongs to the county courts. In others it is invested in local courts for lesser subdivisions of territory with the purpose of cheapening the settlement of estates. In a few these local courts are very numerous, all the towns of the State being distributed into small groups and each furnished with its Probate Court, the judge of which, in many instances, has had no legal training, and receives no compensation except stated fees for such business as may actually come before him. An appeal is given from his orders to a higher court of general jurisdiction. In practice such a system works fairly well. If there are suitable lawyers in the group of towns forming a probate district, one of them who belongs to the prevailing party is generally made the judge if he will accept the office, and if he fills it well is apt to be re-elected, whichever party may then be uppermost. If a lawyer is not appointed and a case of any difficulty presents itself, the judge will probably consult some counsel in whom he feels confidence, and who will be sufficiently flattered by the request to advise him without making any charge for it.

The proper seat of administration is in the State and the local subdivision of the State where the dead man belonged. Proceedings there affect all his personal property wherever it may be found, and generally his real estate situated anywhere in the State. Real estate in another State can be affected by probate

¹ *United States v. Perkins*, 163 U. S. Reports, 625.

proceedings only if they take place there, by its authority. For that purpose "ancillary" administration is often taken out, that is, one designed to serve the interests of the general succession as administered in the seat of the principal administration.

Since the right of a personal representative to act for the estate of the dead comes from the positive law of the particular sovereign having the proper jurisdiction, and since no law of a particular sovereign can be enforced, by virtue of his power or anything dependent on it, outside of his territorial jurisdiction, it follows that no executor or administrator can of right maintain a suit, as such, out of the State from the laws of which he derives his authority. He may take possession of the goods of the estate found in another State, or collect debts due from its citizens if no objection be made, but if forced to claim the aid of judicial process he must first prove his title there before the appropriate Probate Court by taking out ancillary administration, in which case he will probably be compelled to give security for the proper discharge of his duties under such appointment.

CHAPTER XVI

BANKRUPTCY AND INSOLVENCY COURTS

It is within the power of Congress to assume the exclusive regulation of bankruptcy proceedings throughout the United States.¹ There is in this country no real difference in meaning between the terms bankruptcy and insolvency. Each denotes a *status* into which one unable to pay his debts, as and when they fall due, may put himself, or be put by his creditors. The remedy is not confined to any particular classes of persons, and no more fault is implied on the part of one who is adjudged a bankrupt than on the part of one who is adjudged an insolvent.

During most of the history of the United States there has been no uniform law on the subject of bankruptcy for the whole country. Three bankrupt Acts were enacted by Congress from time to time during the first century after the adoption of the Constitution. Each followed some serious financial crisis, and was repealed not long after the immediate effects of the crisis had passed away. They were adopted as a kind of *συνάχθεια* to help insolvent debtors to get on their feet again. A later Act passed in 1898 is still in force,² and as it contains many provisions which have been found useful by creditors as well as by

¹ U. S. Constitution, Art. I, Sec. 8.

² 30 U. S. Statutes at Large, 544; 32 *id.*, 797.

debtors, it is not unlikely to remain permanently upon the statute-books.

The prosperity of the United States rests mainly on the absolute free trade which exists between the several States. That necessarily results in innumerable credits extended by citizens of one State to those of others, and in immense property interests in each State belonging to non-residents. In case of insolvency full justice can not be worked out except through the legislative powers vested in the United States.

The Act of 1898 allows any one except a corporation to become a voluntary bankrupt. Practically any insolvent debtor can be thrown into involuntary bankruptcy, except wage earners, farmers, incorporated banks, or business corporations owing less than \$1,000. This is so even if a State court of insolvency has already taken charge of his affairs; and if that has occurred it is of itself a sufficient reason for bankruptcy proceedings.

Petitions in bankruptcy are preferred to a District Court of the United States. Each bankrupt estate is put in charge of one or more trustees. They can maintain actions to recover or protect it, as a general rule, in the courts of any State as well as in those of the United States.¹

Their title does not extend to anything which by the laws of the State where the bankrupt belongs is exempt from his creditors. Such exemptions differ greatly in different parts of the country. In some States certain property of the value of \$5,000 may be

¹ See *Bardes v. Bank*, 178 U. S. Reports, 524.

exempt; in others the amount which the debtor can retain is comparatively trifling. There is, therefore, no uniformity in the result; but there is, nevertheless, uniformity in the rule under which the results are reached, and this is enough to support the validity of this provision of the statute.¹

The bankrupt may propose a composition to his creditors, and it may be accepted by a majority of them in number if they also hold the major part of the indebtedness. If such an acceptance is confirmed by the court the entire indebtedness is discharged when the total amount to be paid (including whatever is necessary to discharge all preferred claims) is deposited in court.

A discharge may be granted to every honest bankrupt (whether his estate pays anything to his creditors or not), which clears him forever of all his ordinary debts. It does not apply to taxes nor to liabilities for certain wrongs of an aggravated character; nor can two successive discharges in bankruptcy be procured within six years unless the first was the result of involuntary proceedings.

Whenever there has been no national bankruptcy law in existence, the States have been held to be free to pass such insolvent laws as they might think proper. During the existence of a national bankruptcy law no State insolvent law can be of any force which covers the same field.² Its operation is excluded or suspended

¹ *Hanover National Bank v. Moyses*, 186 U. S. Reports, 181.

² *Ogden v. Saunders*, 12 Wheaton's Reports, 213; *Tua v. Carriere*, 117 U. S. Reports, 201; *Ketcham v. McNamara*, 72 Conn. Reports, 709, 711; 46 Atlantic Reporter, 146.

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as a necessary effect of the enactment of the Act of Congress, although that contains no express provision to that effect.

Most of the States have on their statute-books provisions for a permanent system of insolvency proceedings. In some they are as favorable to the debtor as the United States bankrupt law of 1898: in more they are less favorable. Generally such proceedings are brought before a court of special jurisdiction, constituted both for this purpose and for the settlement of the estates of deceased persons and of those who are incapable of managing their own affairs. In the older States it is often made a condition of a discharge that the creditors shall have received a certain percentage of their claims.

The relief which the States are competent to give either to debtor or to creditor is very inadequate. The discharge of the debtor is of no avail except as against those creditors who were subject to the jurisdiction of the court. None are so subject except those belonging in the State, or actually taking part in the proceedings.

Every bankruptcy or insolvency proceeding is a great lawsuit. The discharge is the final judgment in it. It can bind none who are not parties to the action. Only those are parties who were bound to appear, or who did appear. No one belonging to any other State or country can be bound to appear, unless in the rare case of a personal service of proper process upon him, made while he was within the territorial jurisdiction. Any creditor, wherever he may reside, who files a claim against the insolvent estate, or receives a dividend

from it, makes himself a voluntary party. But as against a non-resident who keeps aloof and takes no part in the proceedings the discharge is worthless, even in the courts of the very State by authority of which it was granted.

On the other hand, the creditor gets less aid from the State courts than a trustee in bankruptcy. The trustee in bankruptcy can sue in any court in the country in which the debtor could have sued for the same cause of action. The trustee or assignee in insolvency, acting under the appointment of a State court, can only sue within that State, unless his title has been fortified by a conveyance from the insolvent which would be good at common law. So far as his title rests on a law, by which it was taken away from the bankrupt and vested in him, it is ineffectual wherever that law is ineffectual; and the law of no sovereign is effectual of its own force outside of his territorial jurisdiction.

If, therefore, as is commonly true in estates of any magnitude, part of the assets can only be recovered by suit in other States, there must be ancillary insolvency proceedings there, to clothe the principal assignee with the right of action. Should the insolvent be the owner of land in another State, the title to this can only be transferred in accordance with its law, and a foreign assignment in insolvency will be wholly ineffectual. Nor will ancillary proceedings in insolvency be allowed to prejudice the rights of citizens of the State in which they are instituted to any

¹ *Booth v. Clark*, 17 Howard's Reports, 322, 337; *Hale v. Allinson*, 188 U. S. Reports, 56.

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security which they might otherwise have for debts due them from the insolvent.¹ The right, however, of every sovereignty to postpone claims under a foreign bankruptcy or insolvency to the interests of its own people is modified in the United States by the constitutional provision that the citizens of each State are entitled to all privileges of citizens in the other States.²

¹ *Ward v. Conn. Pipe M'fg Co.*, 71 Conn., 345; 41 Atlantic Reporter, 1057; 42 Lawyers' Reports Annotated, 706; 71 Am. State Reports, 207.

² *Blake v. McClung*, 172 U. S. Reports, 239.

CHAPTER XVII

CRIMINAL PROCEDURE

THE American system of criminal procedure rests on the principle that the government should decide on the propriety of beginning all prosecutions, and then should bring and maintain, at its own expense, such as it may deem proper.

The first step ordinarily is the filing by an informing officer of a written complaint in the office of some court or with some magistrate, upon which a warrant of arrest issues as of course. In some jurisdictions original informations in a trial court, as distinguished from indictments, can only be filed by leave of court first obtained. Such is the rule in the courts of the United States.¹

There is no such preliminary consultation with judicial officers as characterizes European criminal procedure. The prosecuting officer assumes the entire responsibility of initiating the prosecution and of giving it the particular form that it may assume. He commonly acts only on such matters as are officially brought to his attention by constables or other officers of police. It is rare that the party injured by an offense complains to him personally. Hence many of the lesser offences go unpunished, particularly in large

¹ United States v. Smith, 40 Federal Reporter, 755.

cities, because the police fail to report them, on account of favoritism or corruption.

The warrant refers to the complaint for its support. Between them, the offense charged, the person accused, and the thing to be done by the officer who is to make service must be particularly stated. "General warrants," that is, warrants of arrest or seizure, not specifying the person who is to be arrested, nor the particular place where the seizure is to be made, are expressly forbidden by the fourth amendment of the Constitution of the United States as respects federal courts, and as respects those of the States, are generally prohibited by their Constitutions.

Any private individual may, by night or day, arrest without warrant one whom he sees committing a felony or a breach of the peace or running off with goods which he has stolen. If he knows that a felony has been committed and has reasonable grounds for suspecting that it was the act of a certain person, he may arrest the latter, although without personal knowledge of his guilt.

A sheriff, constable, or other peace officer may arrest without warrant any one whom he has reasonable ground for suspecting to be guilty of a felony, although it may turn out that no such felony was ever committed. For any ordinary misdemeanor he could not, at common law, arrest without a warrant, unless he personally witnessed the wrongful act or was near enough to hear sounds indicating what was being done.

In practice, officers of local police arrest freely on

mere suspicion and with no personal knowledge either that any offense has been committed or that, if any, the person taken in charge was connected with it. The only risk which they run is of an action for damages, and that is slight. If one were brought and they showed that they acted in good faith and not wholly without cause, the amount recovered would probably be very small, and in any case it would be difficult to collect a judgment against one of them, as they are generally men of small means.

In some of the original States a justice of the peace or higher magistrate, in whose actual presence certain misdemeanors were committed, could deal with the offender summarily and sentence him to a fine without any written complaint or warrant. This was a survival of colonial conceptions of the majesty of official station, and the statutes justifying the practice soon became practically obsolete.

It is one of the distinguishing features of the English system of criminal procedure that any private individual can initiate a criminal prosecution, and that prosecutions are generally instituted in that manner. In doing so, he exercises a right belonging to every member of the general public, and the proceeding is, in that point of view, a public one.¹ At common law there were but two guaranties against thus bringing forward frivolous or malicious accusations. The complainant was obliged to verify his charge by oath, and he was liable to a civil action if the defendant was acquitted and it appeared that there was no reasonable ground for the prosecution.

¹ See Maitland, "Justice and Police," 141.

In some of our States, also, if any private individual files a complaint under oath before a proper magistrate accusing another of a properly specified offense, a warrant of arrest may issue. In many there are statutes authorizing *qui tam* actions to be brought by any one. These are actions to recover a statutory penalty prescribed for some wrongful act in the nature of a misdemeanor. The term *qui tam* comes from the Latin terms of the old English writ used for such proceedings, in which the plaintiff describes himself as one *qui tam pro domino rege quam pro seipso in hac parte sequitur*. The plaintiff is styled "a common informer," and his action is for the joint benefit of himself and of the State, or of some other public corporation or officers designated by the statute. He is sometimes given an option to sue in the form of a civil action, or by an information and the use of criminal process. In proceedings of the latter description a warrant issues upon which the defendant is liable to arrest.¹ The action may, under some statutes, be brought in the name of the government, though by and at the cost of the informer. In such case, unless it is otherwise provided, he retains the exclusive management of the cause as fully as if he appeared as the sole plaintiff on the face of the record. If the plaintiff obtains judgment, and collects the penalty, he must pay half of it over to the government. If he fails, he is personally liable to the defendant for the taxable costs of the action. Under such a statute, a public prosecuting officer can sue for the entire

¹ *Canfield v. Mitchell*, 43 Conn. Reports, 169.

penalty, whenever no action has been brought by a private individual.

The tendency of modern American legislation is toward placing the collection of penalties for misdemeanors wholly in the hands of public officers. The *qui tam* action is certainly a cheap mode of enforcing laws, and one likely to be pressed to a prompt issue. As observed by the late Judge Deady, "prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."¹ But they appeal to sordid motives and are liable to abuse. One who is exposed to such a suit often gets a friend to bring it, in order to forestall proceedings by others or by the State, and with a view to delaying or defeating the collection of the penalty. These considerations induced Parliament to restrict the remedy in England as early as the reign of Henry VII, and have proved of equal force in course of time in the United States.

Justices of the peace and local municipal courts of criminal jurisdiction are generally given power to deal finally with a few petty offenses, subject to a right of appeal to a court where a jury trial can be had. As to all others, their function is, when the warrant of arrest has been executed, to inquire whether there is probable cause for holding the defendant to answer to the charge which has been made against him in a higher court, and if they find that such cause exists, to order him to give sufficient security that he will appear before it for trial. The question is not whether

¹ *United States v. Griswold*, 24 Federal Reporter, 361;
30 *id.*, 762.

the evidence satisfies them of his guilt, but simply whether it is sufficient, in their judgment, to make it proper to send him where the charge can be more thoroughly investigated by those who have the right to condemn or to acquit. In making this inquiry, they hear both sides, if the defendant has any testimony to offer. In most States he is now a competent witness in his own behalf, provided he desires to testify.

He cannot be interrogated in any court or before any magistrate without his consent. This is a weakness in the American system of criminal procedure. Under the English system of prosecutions by private persons, there are greater objections to subjecting an accused person to an examination, and it can now only be had by his consent.¹ The certainty in England also that criminal prosecutions may in any case be subjected to the power of a public officer by the interposition of the Attorney-General or the Director of Public Prosecutions makes it more important to safeguard a defendant who may be arraigned for a political offense, and whose prosecution may be inspired by reasons of a partisan nature. The magistrates upon whom the task of conducting or superintending the examination would naturally fall are also largely both representative of class interests and unlearned in the law.

In the United States local prosecutors are often of a different party from that which controls the State or the United States. They have no close connection with those administering the general affairs of the government. They hold office for fixed terms, not

¹ Maitland, "Justice and Police," 129.

dependent on any shifting of parliamentary majorities or change of ministry. Committing magistrates are in a similar position. They are also in many cases trained lawyers. If our Constitutions could be so modified or so construed as to allow them to ask the accused the questions that the sheriff who makes the arrest or the reporter who hurries after him to the jail is sure to ask, there are many reasons for believing that it would oftener prove a safeguard to innocence than an occasion for extorted and perhaps inconsiderate or misunderstood admissions. And be that as it may, it would certainly lead up to important clues, and frequently bring out admissions that were both unquestionably true and necessary to establish guilt.

The fifth amendment to the Constitution of the United States, and similar provisions in the various State Constitutions, preclude, so long as they stand, any radical reform in this direction. They speak for a policy that was necessary under the political conditions preceding the American Revolution, but which is out of harmony with those now existing in the United States. The interests of society are greater than those of any individual, and yet it is with us the State that is deprived in public prosecutions of an equal chance with the accused. While burdened with the necessity of proving his guilt beyond a reasonable doubt, it cannot, according to the prevailing judicial opinion in this country, so much as ask him at any stage of the prosecution where he was at the time when the crime charged was committed.

The terms of our Constitutions are not such as necessarily to demand the construction which has been

generally given them by the courts. They have been commonly interpreted with a view to making them as helpful as possible to the accused.¹ Provisions against compelling him to testify have been treated as if they forbade requesting him to testify. They would seem, on principle, quite compatible with a procedure under which the committing magistrates should in every case ask the defendant when first brought before them whether he desires to make a statement, telling him at the same time that he can decline if he chooses. Should he then make one, it should be written down at length in his own words, read over to him for his assent or correction, and properly attested. Many a guilty man is now acquitted whose conviction could have been secured on what such a paper would have disclosed or have given a clue to ascertaining. Such an inquiry has long been the English practice.

The hearing before the committing magistrate, if any contest is made, generally does not take place until some time after the arrest. Each party is apt to wish time to prepare for it. Meanwhile, the defendant can generally claim the privilege of release on bail, unless the crime be capital and the circumstances strongly point to his guilt. Here our practice differs from that of an English court of inquiry. While there bail must be allowed in case of misdemeanors and may be in case of felonies; the amount required is frequently so large as to be prohibitory.²

The essence of bail is that the prisoner should enter

¹ *Boyd v. United States*, 116 U. S. Reports, 616.

² Maitland, "Justice and Police," 131.

into an obligation, together with one or more others of pecuniary responsibility as his sureties, to appear whenever he may be called for in the course of the pending proceeding, on pain of forfeiting a certain sum of money. All our Constitutions forbid the taking of excessive bail. The sum should be large enough to give a reasonable assurance that he will not allow it to be forfeited. In fixing the amount, which in each case is left to the good judgment of the officer before whom it is taken, special regard should be had to the gravity of the offense, the nature of the punishment in case of conviction, and the means of the defendant or his friends. If too large an amount is demanded, the defendant can get relief on a writ of *habeas corpus* issued by some superior judge.

This privilege of bail in most States extends to, or at the discretion of the court may be allowed at, any stage of a cause, not capital, even after a final judgment and sentence, provided an appeal has been allowed with a stay of execution.

Bail is given orally or in writing, according to the practice of the particular State. When given orally, it is termed a recognizance. This is entered into by the personal appearance of those who are to assume the obligation before a proper magistrate or clerk of court, and their due acknowledgment before him that they do assume it. He makes a brief minute of the fact at the time, from which at any subsequent time he can make up a full record in due form. When bail is given in writing, the obligation is prepared in behalf of the government and executed by the parties to it.

Whoever gives bail as surety for another is by that

very fact given a kind of legal control over him. He can take him into actual manual custody without any warrant, and against his will, for the purpose of returning him to court and surrendering him to the sheriff. This right is a common law right, arising from the contract of suretyship, and is not bounded by State lines. If the principal absconds from the State, the surety can have him followed and brought back without any warrant of arrest.

The amount of the bail, should it be forfeited, is payable either to the government or to some other representative of the public interests, as may be prescribed by statute. If the sureties have any equitable claim to relief by a reduction of the amount, there is often given by statute or judicial practice a right to the court in which the obligation was given or before which its enforcement is sought to grant a reduction from the sum which would otherwise be due upon it.

When a committing magistrate requires the defendant to give bail to appear in a higher court, and he does not give it, he will be committed to jail to await his trial there. In this court he is sometimes tried on the complaint upon which he was originally arrested: oftener a new accusation is prepared. This may be either an information or an indictment.

At common law, no one could be tried for a felony unless a grand jury were first satisfied that there was good ground for it. The grand jury consisted of not more than twenty-four inhabitants of the county, and in practice never of more than twenty-three, summoned for that purpose to attend at the opening of a

term of court. To authorize a prosecution the assent of twelve of them was required. They heard only the case for the prosecution, and heard it in secret, after having been publicly charged by the court as to the nature of the business which would be brought before them. The court appointed one of them to act as their foreman, and he reported back their conclusions in writing, and in one or the other of two forms—by presentment or indictment.

A presentment was a presentation, on their own motion, of an accusation against one or more persons. They were the official representatives of the public before the court, and it might well be that offenses had occurred, and become matters of common notoriety, prosecutions for which no one cared or dared to bring. Such a proceeding was comparatively rare.

The common course was to pass only on such written accusations as others might submit to their consideration. These were called bills of indictment. If the grand jury believed that there were sufficient grounds for upholding any of them, their foreman endorsed it as "A true bill," and it then became an indictment. If, on the other hand, they rejected a bill of indictment as unfounded, the foreman indorsed it as "Not a true bill," or with the Latin term "*Ignoramus*," and this was the end of it.

The organization and functions of the American grand jury are similar, except that here we have prosecuting attorneys to procure the presence of the necessary witnesses and direct the course of their examination. In the Federal courts almost all criminal accusations, great or small, are, and by the fifth amend-

ment to the Constitution of the United States all charges of infamous crimes must be, prosecuted by presentment or indictment. In most of the States the intervention of a grand jury is requisite only in case of serious offenses; in some only in capital cases. It is obvious that it is less needed here than in England, since here it is not within the power of any private individual to institute criminal proceedings against another at his own will, but they are brought by a public officer commissioned for that very purpose and acting under the grave sense of responsibility which such authority is quite sure to carry with it. The grand jury, however, has its plain uses wherever political feeling leads to public disorder. It has also, since the Civil War, been found an effective restraint in some of the Southern States, whether for good or ill, upon prosecutions for violations of certain laws of the United States, brought against members of a community in which those laws were regarded with general disfavor.

Prosecutions by information are those not founded on a presentment or indictment. The information is a written accusation filed in court by the prosecuting officer. In certain classes of cases, the leave of the court must be first asked in some jurisdictions. It is not necessary that it be supported by any previous statement or complaint under oath. The officer who prepares it acts under an oath of office, and that is deemed sufficient to give probability to whatever charges he may make.

If the defendant has already been bound over by a committing magistrate, such an information may take

the place of the original complaint on which the arrest was made. If he has not yet been arrested, or if he was arrested and discharged by such a magistrate, the filing of an information is accompanied by a request for the issue of a warrant for his arrest from the court. Such a paper is called a bench warrant, and is granted whenever necessary, whether upon a presentment, indictment, or information.

An information may be amended by leave of the court at any time. A presentment or indictment cannot be. They, when returned to court, are the work of the grand jury, and they end its work. An amendment of a legal process can logically be made only by the hand which originally prepared it. This rule leads to the escape of many a criminal. If prosecuted by indictment, the case against him must be substantially proved—in whole or part—as there stated, or he goes free. Prosecuting officers therefore naturally prefer to proceed upon information whenever the law permits it.

The intervention of a grand jury is also often the necessary cause of a delay alike prejudicial to the State and to the prisoner. It can only be called in when a court is in session, by which it can be instructed as to its duties and to which it is to report its doings. Months often elapse in every year when no such court is in session. For this reason, in case of a poor man under arrest on a charge of crime, who cannot furnish bail, it would often be much better for him were his liability to be brought to trial to be settled promptly by a single examining magistrate. At the hearing in that case also he has a right to be

present and to be heard. Before a grand jury he has no such right.

In most States, the great majority of indictments are against those who have already been committed on a magistrate's warrant to answer to the charge, should an indictment be found. The accused thus has two chances of escape before he can be put on trial for the charge against him: one by a discharge ordered by the committing magistrate, and one by the refusal of the grand jury to return "a true bill." A grand jury is more apt to throw out a charge as groundless than a single magistrate. He feels the full weight of undivided responsibility. If he err by discharging the prisoner, he knows that it may let a guilty man go free, untried. If he err by committing him for trial, he knows that, if innocent, the jury are quite sure to acquit him. He acts also in public. The whole community knows or may know the proofs before him, and will hold him to account accordingly. On the other hand, in the grand jury room all is secret. The prosecuting attorney, if admitted, does not remain while the jurors are deliberating over their decision. No one outside knows who may vote for and who against the return of an indictment. Every opportunity is thus afforded for personal friendship for the accused or business connection with him to have its influence. Judges know this, and in their charge often emphasize the importance and gravity of the duty to be performed. In 1903, the prosecuting officer in one of the small counties in Kentucky had prepared indictments against several men of some local prominence for arson and bribery. A special grand jury was

summoned to act upon them. There was reason to expect some reluctance on the part of several. Of the witnesses for the State some were no less reluctant. There was great public excitement in the court town. One witness came there over ninety miles by rail hidden, for fear of his life, in a closed chest in the car of an express company. The grand jury were told by the court that they must make their inquiry a thorough one and indict without fear or favor every person in the county who ought to be indicted. "If," the judge added, "the evidence calls for indictments and you don't make them, they will be made anyway. If you do not do your full duty, I will do mine by assembling another grand jury." They did theirs under these stirring injunctions, and the indictments were promptly found.

After the indictment or information comes the arraignment. This is bringing the defendant before the court and, after the charge made against him has been read, directing him to plead to it. Before the plea is entered, if he has no counsel, he is asked if he desires the aid of one, and if he responds that he does (or should he not, if the court thinks he ought to have counsel), some lawyer will be assigned to that duty. Some of the younger members of the bar who are present are generally desirous of being so assigned to defend those who have no means to employ such assistance. The court ordinarily makes the assignment from among their number, but in grave cases often appoints lawyers of greater experience and reputation. No one who is so assigned is at liberty to decline without showing good cause for excuse. A

small fee is often allowed by statute in such cases from the public treasury. Statutes are also common providing that witnesses for the defense may be summoned at the cost of the government, if the defendant satisfies the court that their testimony will be material, and that he is unable to meet this expense.

In the federal courts, in capital cases, the defendant must be furnished with a copy of the indictment and a list of the jurors summoned to court and of the government witnesses, at least two days before the trial.

Whether impanelling the jury for the trial of a case is a long or short process will depend largely on the intelligence and firmness of the judge who holds the court. Each side can challenge a certain number of the jurors in attendance without stating any reasons for it, as well as any and every one of them for cause shown. If a juror has formed an opinion as to the guilt of the accused so definite as to amount to a settled prejudice against him, he is incompetent. In grave cases the prisoner's counsel will often seek to examine every juror whose name is drawn at great length as to whether he has such an opinion. A capable judge will keep such an inquiry within close limits.

In 1824, an indictment for murder was found in Kentucky against a son of the Governor. The case was one which excited great public interest, and was talked over from one end of the State to the other. The result was that when the trial came on it was found impossible, term after term, to make up a jury of men who, from what they had heard or read, had

not formed what the defense claimed and the court thought to be a sufficiently firm opinion as to the guilt or innocence of the accused to justify their exclusion. The legislature was finally appealed to for relief and passed a statute that an opinion formed from mere rumor should not be a ground of challenge. The case was then, in 1827, taken up for the ninth time, but with the same result, whereupon the defendant's father gave him a pardon, on the ground that "the prospect of obtaining a jury is entirely hopeless," and that he had "no doubt of his being innocent of the foul charges."¹

When a capital case is coming on, great pains will often be taken by the prisoner's counsel to ascertain the characteristics and disposition toward his client of each of the jurors who have been summoned to court. This has sometimes been carried to the extent of trickery, particularly in some of the Southern States. Agents have been sent over the county to see every man capable of jury service. There is some ostensible reason given for the call. He is perhaps asked to buy a photograph of the accused; perhaps to contribute to a fund to provide him with counsel. This naturally leads to some expression of opinion in regards to the charge made against him, and if the man thus "interviewed" should be afterwards offered as a juror, he is challenged or not challenged according to the information so obtained.

In every criminal case the defendant's guilt must be proved beyond a reasonable doubt. A mere preponderance of evidence is not enough. In other

¹ Niles' Register, XXXII, 357, 405; XXXVIII, 336.

respects the rules of evidence are applicable which obtain in civil cases.

If a verdict of Not Guilty is returned, the court orders the discharge of the prisoner, as a matter of course, unless provision has been made by statute for an appeal by the State for errors of law committed on the trial. No such appeal can be allowed for the purpose of obtaining a new trial on the ground that the jury came to a wrong conclusion on the facts. This would be to put the defendant twice in jeopardy, which our Constitutions generally forbid. Even under the practice prevailing in the Philippine Islands, where they have no juries, and an appeal to a higher court for a new trial on the merits has always been allowed to either party in a criminal case, as a matter of right, this rule is held to apply.¹

If the verdict is one of Guilty, the sentence is pronounced by the judge. He generally has a broad discretion as to the extent and nature of the punishment. For many offenses, either fine or imprisonment or both may be imposed, according to his best judgment. For most, when imprisonment is ordered, it may be for a term such as he may prescribe within certain limits, as, for instance, from one to five years. In a number of States of late years the judge is permitted in such a case to sentence for not less than one year, and it is left to some administrative board to determine later how much, if any, longer the confinement shall last, in view of the circumstances of the offense, the character of the prisoner, and his conduct since his sentence.

A considerable and increasing group of penologists

¹ *Kepner v. United States*, 195 U. S. Reports, 100.

is pressing upon our legislatures the extension of the principle of the "indeterminate sentence" by removing the limit of a *minimum* term. It is doubtful if such a change would satisfy the constitutional requirement of a trial by jury. That in its nature involves a trial before a judge and a sentence imposed by the court upon the verdict. Can that be deemed a judicial sentence to imprisonment which is a sentence to imprisonment during the pleasure of certain administrative officials? Judgments are to ascertain justice. To do this they must be themselves certain. In a purely indeterminate sentence there is no certainty until it has been made certain by the subsequent action of the administrative authorities. It may turn out to be imprisonment for life, and the advocates of this mode of action frankly say that such ought to be the disposition of all incorrigible and habitual criminals. If so, ought not the fate to be meted out to them by judicial authority? Can anything less than that be considered as due process of law?

An experienced and able judge seldom makes any serious error in grading the punishment of offenders who have been tried before him. The sentence is not pronounced until they have been fully heard as to all circumstances of extenuation, nor until the government has been heard both as to these and as to any circumstances of aggravation. The sentence, if the offense be a grave one, cannot be pronounced except in the presence of the convicted man. He has an opportunity for the last word.

Judges who are neither able nor experienced frequently impose sentences too light or too severe. We

have too many such judges in the United States. The real remedy for the evil is to choose better ones. As between judges and boards of prison officers or of public charities, the judge always has the great advantage of having tried the case and heard the witnesses. He ought therefore to be best able to fix the term of punishment.

The punishment to which one can be sentenced on a conviction of crime is now generally limited to fine or imprisonment. For graver offenses both may be inflicted: for murder, and in some States for a very few other crimes the penalty is death. The policy of the older States long was to require those whose offenses were directed against property to make good the loss of the injured party. Whipping was also often added, and it was formerly a common mode of punishment throughout the country for all minor offenses. Every colony used it. It was authorized by the original Act of Congress in 1790 on the subject of crimes, and was not abolished for the courts of the United States until 1839. It was provided for in the early statutes of most of the States, and in some still is. Until 1830, it was the only mode of corporal punishment allowed in Connecticut for the general crime of theft. For boys it is often the only punishment that can properly be administered. To fine them is to punish others. To imprison them is, in nine cases out of ten, to degrade them beyond recall. Virginia, in 1898, reverted to it as an alternative to fine or imprisonment in the case of boys under sixteen, provided the consent of his father or guardian be first given. Such a statute seems absolutely unobjectionable from any standpoint.

It is often asserted that whipping is a degrading and inhuman invasion of the sanctity of the person. To shut a man up in jail against his will is a worse invasion. But as against neither is the person of a criminal convict sacred. He has justly forfeited his right to be treated like a good citizen. Whether whipping is a degradation or not must depend much on the place of its infliction. The old way in this country, as in England, was to inflict it in public. This puts the convict to unnecessary shame. Let him be whipped in private, and his only real degradation will be from his crime. So inhumanity is needless. A moderate whipping only should be allowed. That is far more humane to most men than a term of jail; that is, it detracts less from their manhood than the long slavery of confinement.

Of late years there has been a decided movement in the United States toward a return to the penalty of whipping for atrocious cases of assault or offenses by boys.¹ It is probable that it will find more favor hereafter in the South as a punishment for negroes. Most of their criminals are of that race. The jails have no great terrors for them. They find them the only ground where they can mingle with their white fellow citizens on terms of social equality. But they are sensitive to physical pain. A flogging they dread just as a boy dreads a whipping from his father, because it hurts. The South may have been held back from applying this remedy in part from the apprehension

¹ See Paper on "Whipping and Castration as Punishments for Crime," *Yale Law Journal*, Vol. VIII, 371, and President Roosevelt's Message to Congress in December, 1904.

that it might be considered as reinstating the methods of slavery. No such criticism could fairly be made. Confinement in jail is involuntary servitude, and involuntary servitude is slavery. Whipping is a substitute for it: it saves from slavery.

In several of the Southern States, instead of imprisonment, ordinary offenders are set at work in the open air, either on convict farms, or in chain gangs on the highway, or in the construction of railroads or similar works. This plan prevails in Georgia and Arkansas to such an extent that very few are confined in the penitentiary. The convicts in these States are mainly negroes. When, as has been at times permitted, they have been turned over to private employers to work in this manner for wages paid to the State, many of the abuses of slavery have reappeared, and public sentiment is becoming decidedly adverse to the allowance of such contracts for convict labor. Similar objections do not lie in their employment on State farms, and in North Carolina and Texas this has been tried with considerable success.¹

Special courts have been organized, or special sessions of existing courts directed, for the disposition of prosecutions against children in several of the States and in the District of Columbia during the past few years. The judge holding such a "Juvenile Court" or "Children's Court" is expected to deal with those brought before him rather in a paternal

¹ See "Bulletin de la Commission Pénitentiaire Internationale," 5th series, II, 179.

fashion. An officer is generally provided, known as a Probation Officer, to whom the custody of the accused is largely committed both before and after trial. He is to inquire into each case and represent the defense at the hearing. In case of conviction, the child can, on his advice, be released on probation, or the sentence can be suspended.

For errors of law committed by the judge in the course of the trial the defendant commonly has a right of appeal. Until 1891 this was not true in the federal courts, and a man convicted and sentenced there under an erroneous view of the law and in disregard of any of his rights had no remedy, even in a capital case. It was so in Delaware until 1897.

In some States there is a right of appeal in favor of the government as well as of the defendant for errors of law, and this even after a jury trial ending in a verdict of acquittal. It is there held that the common constitutional provision that no man shall be put twice in jeopardy of life or limb is not contravened by the allowance of such a remedy. The writ of error is a stage in the original prosecution. One acquitted of crime is deemed not to be put out of jeopardy unless he has been acquitted according to the forms of law, and after a trial conducted according to the rules of law. What these rules are, in case of dispute between the government and the accused, must be determined by such proceedings in the cause as the legislature may deem best adapted to ascertain them in an authoritative manner. Such a mode may properly be furnished by allowing a resort to a higher court, and a resort in

favor of either party.¹ In other States such a review, in favor of the government, of the conduct of the cause is only supported when the exceptions taken are founded on what may have preceded the trial.² This distinction is approved by the Supreme Court of the United States.³

For errors in conclusions of fact the defendant, in certain cases, has a remedy on a petition for a new trial, but in no case can the State ask for one. This is true even though the trial was not had to a jury.

There is no doubt that new trials are too often granted in the United States in favor of those who have been convicted of crime. Particularly is this true when they are ordered because of some irregularity of procedure or slip in the admission or exclusion of evidence. A verdict, whether in a civil or criminal case, should stand, notwithstanding it was preceded by erroneous rulings or omissions of due form, unless the court of review can see that substantial injustice may on that account have been done.⁴ To release a convicted criminal for error in mere technicalities not really affecting the question of his guilt tends to make the people lose faith in their courts

¹ *State v. Lee*, 65 Conn. Reports, 265; 30 Atlantic Reporter, 1110; 48 American State Reports, 202; Kent, J., in *People v. Olcott*, 2 Day's Reports, 507, note.

² *People v. Webb*, 38 California Reports, 467.

³ *Kepner v. United States*, 195 United States Reports, 100, 130.

⁴ See Paper on "New Trials for Erroneous Rulings upon Evidence," by Professor J. H. Wigmore, in the *Columbia Law Review* for November, 1903.

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and resort to lynch law as a surer and swifter mode of punishment.

Appeals in criminal causes are, however, much rarer and also much less often successful than is generally supposed. About eleven thousand persons were convicted of felonies in the County Courts of New York during the five years from 1898 to 1902, inclusive of each, and of these less than nine in a thousand pursued an appeal, not a third of whom secured a judgment of reversal.¹ In Massachusetts, about a hundred thousand criminal prosecutions are annually brought, and the appeals to the Supreme Judicial Court from sentences of conviction rarely exceed twenty to twenty-five in number, and upon these in each of the years 1902 and 1903 only two new trials were granted.²

A comparison of the number of those put to death in the United States for crime by the courts, and on a charge of crime by a mob, for the past three years shows these results:

	Executed by Judicial Sentence.	Lynched.	Total.
1901	118	125	243
1902	144	96	240
1903	123	125	248

A large majority of those lynched were negroes, and met their fate in the South. It is extremely difficult to secure a conviction of those who take part in such acts of violence. They commit the crime of murder, and the penalty is so heavy that their fellow-

¹ Nathan A. Smyth, *Harvard Law Review* for March, 1904.

² *Law Notes* for December, 1904.

citizens are unwilling to subject them to it. The offenses with which the men whom they kill are charged are also generally of a nature which make them peculiarly offensive to the community. Many are negroes charged with the rape of a white woman, to whom it would be intensely disagreeable to testify against them. Not a few are men under sentence of death, who it is feared may escape or delay punishment by an appeal.

Such considerations cannot excuse, but present some slight palliation for those acts of mob violence by which the people of the United States are so often disgraced. It may be added that out of the Southern States they are quite rare, and in the Northeastern States substantially unknown. Of the one hundred and four lynchings in 1903, only twelve occurred in the North or West.

CHAPTER XVIII

THE EXERCISE OF JUDICIAL FUNCTIONS OUT OF COURT

A PUBLIC officer, whose duties are mainly other than judicial, may be invested with judicial power to be exercised only in certain causes which may be brought before him, in disposing of which he acts as a court. Such an one is a judge only when he is holding court. When it is adjourned, no court exists of which he could be a judge. Justices of the peace and parish judges are officers of this description. But ordinarily judges are appointed to hold some regular court, with stated sessions, which is always in existence. To such a judge considerable powers of a judicial nature are usually given for exercise when his court is not in session.

The writ of *habeas corpus*, for instance, may be issued either by a court of record or by a judge of such a court, if applied for when the court is not in actual session. In the latter case, the return of the writ is made to him, the trial had before him, and judgment rendered out of court, or, as it is styled, "at chambers." While sitting for such a purpose, he may be regarded as exercising functions which really belong to the court and acting as a part of it.

Statutes often, in case of a court having but a single judge, give him power to hold special courts whenever he may think proper. In such a case no very

definite line is drawn between what judicial business the judge does and what the court does. While the proper and normal constitution of a court of record requires the attendance not only of a judge, but of a clerk and a crier or sheriff's officer, the only one whose presence is indispensable is the judge. A District Judge of the United States has this power of holding special courts, and is a court wherever and whenever he pleases to transact judicial business, whether he describes himself in such papers or process as he may issue, as court or judge.¹

The judges of courts having equitable jurisdiction act often out of court in the issue of temporary injunctions. These are writs directing some one to refrain from doing a certain act. They generally direct it under pain of a specified pecuniary forfeiture; but whether they do so or not, disobedience is punishable also by arrest and imprisonment, being treated as a contempt of court. The need of an injunction is often immediate. It would be worthless unless promptly granted. When, therefore, no court having power to issue one is in actual session, there would be a failure of justice if the judge could not act to the extent of granting temporary relief. Whether the injunction should be made permanent is a subsequent question, to be determined after a full hearing by the court. It may, in urgent cases admitting of no delay, be issued *ex parte*, but ordinarily the defendant is notified and has an opportunity for a summary hearing, either orally or on affidavits, before action is taken.

¹ The U. S. v. The Schooner "Little Charles," 1 Brockenbrough's Reports, 382.

A similar power often vested in judges at chambers is that of appointing a temporary receiver; that is, of some one to take temporary charge of property in behalf of and as agent of the court, when this seems necessary in order to preserve it. If the affairs of a commercial partnership get into such a condition that the partners cannot agree on the mode of conducting it, such an appointment can be made to tide matters along for the time being. So in case of an insolvent debtor his estate may, under certain circumstances, be placed in a receiver's hands by a summary order, issued out of court.

It may be added that by the statutes both of the United States and of all the States many powers of a *quasi*-judicial character are conferred on judges to be exercised out of court, such as those of ordering the arrest of one suspected of criminal conduct, examining into the charges against him on his arrest, and admitting him to bail or sending him to jail for want of it.

CHAPTER XIX

APPELLATE COURTS

For each of the States and Territories as well as for the United States there is one supreme court of appellate jurisdiction.

The Supreme Court of the United States can entertain original actions of certain kinds.¹ A few also of the State supreme courts of appeal have a limited original jurisdiction. This is generally confined to equity causes, election contests and certain actions for extraordinary relief known as prerogative writs, such as informations in the nature of *quo warranto* and writs of mandamus.

The term "appeal" in its strictest signification is confined to a removal of a cause after trial to a higher court for a new trial on the merits.

It is also and now more commonly used to denote such a removal for the purpose only of inquiring whether any legal errors were committed on the trial or are to be found in the judgment. In this sense it covers proceedings by a writ of error, and any other mode of reviewing questions of law.² If it does not appear from the record of the lower court that any of the errors that may be claimed (or "assigned," as

¹ See Chap. ix.

² See the *Federalist*, No. LXXXI.

the phrase is) exist, the judgment is affirmed; otherwise the cause is sent back for a new trial or, if the objections are fundamental and fatal to its maintenance, is dismissed.

Appellate courts are of many kinds. Some are such exclusively; some mainly. In others the functions of entertaining appeals is a minor one, most of their time being occupied in trying original causes. An appeal from judgments of a justice of the peace, for instance, is generally given on the merits to county courts, but the greater part of the litigation before them comes there in the first instance. So the judgments of county or other minor courts are often reviewable on appeal for errors in law in some superior court which, like them, is principally occupied in the exercise of an original jurisdiction.

When the American colonies passed into States, as has been seen, they were habituated to the thought of a supreme controlling authority exercised by one tribunal of a judicial character of last resort. The judicial committee of the Privy Council had administered this sovereign power for them, and for a long period of years, with general acquiescence.¹ The uniformity of result thus obtained was acknowledged to be advantageous. It was now necessary to replace them by American courts of last resort, and it was not difficult in doing so to improve upon the English model. The time had come for separating, as far as it could conveniently be accomplished, judicial from political power.

Virginia was the first to act. A few days before the

¹ See Chap. I.

Declaration of Independence she adopted a Constitution (under which the government was carried on until 1830, though it was never formally submitted to or ratified by the people) providing for a separate judiciary headed by a Supreme Court of Appeals whose judges should hold office during good behavior, and be ineligible to the Privy Council or General Assembly.

This divorce of judiciary and legislature was not the plan universally followed.

New Jersey, in which as a colony the Governor and Council had possessed an appellate power like that vested in the English House of Lords, was so well satisfied with this arrangement as to continue it in her Constitution of July 3, 1776, and up to the present time puts upon her Supreme Court a certain number of judges who give but a part of their time to this work, and are not necessarily (though in practice of late years they generally have been) lawyers.

New York, in her Constitution of 1777, pursued a somewhat similar plan. Her highest court was one "for the trials of impeachments and the correction of errors." Its members were the Senate with the Chancellor and judges of the Supreme Court. When a judgment of that court was brought up for review the judges were to state their reasons for giving it, but had no vote. This scheme was adhered to with little modification until 1846. What made it tolerable was that many of those elected Senators were naturally lawyers, and that to be in the Senate soon became the ambition of a lawyer with any desire to know how it would feel to be a judge. Able and learned opinions were pronounced by such men in exercising their

judicial functions, and some of them in the New York reports are still frequently the subject of reference as clear and satisfactory statements of legal principles.

Connecticut, in 1784, when she instituted for the first time a court of last resort, made it up of the Lieutenant Governor and the twelve Assistants, and soon added to it the Governor himself. A plan of this kind was likely to work in that State, as in New York, better than it looked. Lawyers by this time had come to fill most of the higher offices of state. Although the Assistants were elected annually it was under a complicated scheme of nomination, which, unless in case of a political revolution, ensured re-election in every case. A majority of the Assistants were always members of the bar. They were also Federalists from the beginning of party divisions in the country. Naturally, the Republicans found such a state of things intolerable. All the power of government in Connecticut, said one of those who were celebrating Jefferson's second election to the Presidency in 1804, "together with a complete control of elections, are in the hands of seven lawyers who have gained a seat at the council board. These seven men virtually make and repeal laws as they please, appoint all the Judges, plead before those Judges, and constitute themselves a Supreme Court of Errors to decide in the last resort on the laws of their own making. To crown this absurdity, they have repealed a law which prohibited them to plead before the very court of which they are Judges." Attacks like this were too just to be resisted, and two years later the Governor, Lieutenant-Governor and

Assistants were replaced by the Judges of the Superior Court.

Constitutional provisions that the right of trial by jury shall be preserved inviolate preclude, as a general rule, the establishment of courts in which the judges can make a final disposition of petty causes which turn on disputed facts. An appeal from their decision must be allowed, and a new hearing given on the merits in a court furnished with a jury. Under the Constitution of the United States a trial by jury cannot be claimed in civil cases at common law involving a demand of not over twenty dollars, and in most of the older States it cannot be in cases where it was not a matter of right prior to the adoption of their Constitutions.

The verdict of a jury can only be reviewed on its merits by a court of last resort where it was clearly and palpably against the weight of evidence, and in order to do this the whole evidence given in the trial court must be certified up.

Where a judgment has been rendered on a finding of facts made by a judge in a cause of an equitable nature, this finding can, in the courts of the United States and in many of the States, be reversed on any point on appeal. For this purpose also all the evidence that was before him, or all that is pertinent to questions involved, must be reported to the court above.

Except so far as the right of trial by jury may require it, it is a matter of legislative discretion whether to give any remedy in a higher court for the errors of a lower one.

In some States an appeal is given from a judgment of an inferior court even though rendered on the verdict of a jury, to a higher one where another trial may be had before a judge of presumably greater ability. In many States errors in law of petty courts may be reviewed in higher trial courts. In a few of the larger ones, as in the United States,¹ errors in law of the higher trial courts, in a considerable class of cases, are finally disposed of in an intermediate appellate court, constituted to relieve the court of last resort from an overweight of business.

Ordinarily it is the statutory right of a defeated litigant to take an appeal, provided he can state any colorable ground of exception. In some jurisdictions he is required to obtain the approval of the trial court or else of some member of the appellate court. There are many judges who think that such a practice should be universally adopted. It would certainly tend to relieve the dockets of appellate tribunals, and to bring lawsuits to a speedier end. If one were sure that the judge to whom application was made for an approval of the appeal would always act intelligently and impartially, such a precaution against useless litigation would be admirable. But the trial judge is not in a position that naturally leads to an unprejudiced judgment. The appeal is asked on account of mistakes of his, and he will not be apt to think that he has made any. The judge of the appellate court will be impartial and unprejudiced, but he will have a very imperfect knowledge of the case. He could only be asked

¹ See Chap. ix.

to make a hasty examination of the points involved, and it would be quite possible for him to reject as frivolous grounds which, on a lengthy investigation after a full argument, might have seemed to him substantial.

In view of these objections, and of the unequal attainments and experience of the different judges of our courts, the bar are generally in favor of making appeals a matter of right; and what the bar favors in such a matter the legislature usually enacts.

The opinions and judgments of all American courts of last resort are officially reported for publication. At first they were not so reported. The earliest volume of American judicial decisions (Kirby's) was published in 1789 as a private venture. A few years later the States began to provide official reporters for their highest courts and soon assumed the expense of publication. There are now more than fifty current sets of federal and State reports, the annual output being about four hundred volumes, containing 25,000 cases. The mere indexing and digesting of these reports for the use of the bench and bar has become a science. While consulted by comparatively few who are not connected with the legal profession, they constitute a set of public records of the highest value to every student of history and sociology.¹

It is the custom to prefix to the report of each case a head-note stating briefly the points decided. Ordinarily this is the work of the reporter. In a few States the judges are required to prepare it; and to do so then naturally falls to the lot of that one of them who wrote

¹ See "Two Centuries' Growth of American Law," 6.

the opinion. Occasionally the head-note contains statements not supported by the opinion. In such case the opinion controls unless it is otherwise provided by statute.

It has not been the usual custom of English judges of courts of last resort to write out their opinions. They have commonly pronounced them orally and left it to the reporters to put them in shape. The consequence has been that English reports have a conversational tone, and are not free from useless repetition. This has been not only a matter of tradition but of necessity. The English judges have always been few in number. Their time has been largely occupied in the trial of cases on the facts. It is only in recent years that certain judges have been set apart especially for appellate work.

American judges, on the other hand, are numerous. There is the waste of energy in our judicial system which is the necessary concomitant of the independent sphere belonging to each separate State. Combination of all of them into one empire would make it easy to reduce the judiciary to a tithe of its present numbers. Their salaries are part of the price we pay—and can well afford to pay—for our peculiar system of political government, under which every State is an *imperium in imperio*.

The ever-increasing number of our States, each with a body of law not exactly like that of any other, and each with a written Constitution which is its supreme law, requires a court of last resort in each. Experience tends to show that it ought not to be composed of less than five. There should certainly be an uneven

number to facilitate decisions by a majority; and unless a minority consists of as many as two, its dissent is apt to carry little weight in public opinion.

In most of the States the court of last resort is not overworked. In some the judges find time to do considerable circuit duty in the trial of original causes. This keeps them in touch with the daily life of the community, and is so far good. On the other hand it disqualifies them from sitting on an appeal from their own decisions, and so either reduces the number of the appellate court occasionally below that which is normal and presumably necessary, or involves calling in some one to act temporarily, which imperils the continuity of thought and uniformity of doctrine which should characterize every such tribunal. There is also a certain natural bias, insensible perhaps to themselves, which tends to make appellate courts stand by one of their members whose rulings while holding a trial court are brought in question. For these reasons it has now become common for the States to confine their appellate judges exclusively to appellate work. The time, therefore, which the English judge gives to circuit duty the American judge can give to writing out his opinions with all the art and care which he can command.

He speaks in most instances to a small audience—the bar alone. But it is the bar of this year and the next year and the next century. Every volume of reports is part of the history of American jurisprudence and of American jurisprudence itself. Occasionally some case arises which involves large political questions, or one of especial local interest. The opin-

ion is then read more widely. The newspapers seize it: reviews take it up. It is not always easy to anticipate what decision will become a matter of public notoriety; what opinion will be quoted as an authority in other States; and what drop unnoticed except by the lawyers in the cause. A judge, therefore, though he have no better motive than personal ambition, is apt to do his best in every case to state the grounds of his conclusions clearly and in order. A certain style of American judicial opinion has thus grown up. It is dogmatic. It offers no apologies. There is neither time nor need for them. The writer speaks "as one having authority." He does not argue out conclusions previously settled by former precedents, but contents himself with a reference to the case in the reports in which the precedent is to be found. He is as brief as he dares to be without risking obscurity.

It is undoubtedly true that many reported opinions are of a very different type. Some of Marshall's assume a tone of apology; but in his day it was needed. He struck at cherished rights of States, upheld by their highest courts, and struck them down, at a time when the country was unfamiliar with the conception of the United States as a national force. Many of those of judges of inferior ability do not rise above their source. They are verbose, repetitious, slovenly, inaccurate in statement, loose in form; perhaps sinking into a humor or sarcasm always out of place in the reports;¹ possibly unfair in describing the

¹ See, for instance, *Mincey v. Bradburn*, 103 Tennessee Reports, 407; *Terry v. McDaniel*, *ibid.*, 415; *Hall-Moody Institute v. Copass*, 108 *id.*, 582.

claims that are overruled. But, as a whole, Americans need not fear to compare the reports of their courts with those of foreign tribunals. No judicial opinions, viewed from the point of style and argument, rank higher than some of those written by American judges.

Those of appellate courts are generally composed and delivered by a single one of their members, but he speaks not only for the court but for every other member of it who does not expressly dissent. Nevertheless, as their conclusions depend on one man for their proper expression, the responsibility for the particular manner in which the opinion may set them forth is properly deemed in a peculiar sense to rest upon him.

Nor, if the opinion is afterwards relied on as establishing a precedent, is the court bound by anything except the statement of the conclusions necessary to support the judgment. If unsound reasons for those conclusions are given, defective illustrations used, or unguarded assertions made, it is chargeable with no inconsistency in subsequently treating them as merely the individual expressions of the judge who wrote the opinion.¹

When Marshall became Chief Justice of the United States he introduced the practice of writing all the opinions himself, and with a few exceptions maintained it for ten years, and until, by successive changes in the court, a majority were Republicans. This, as

¹ *Exchange Bank of St. Louis v. Rice*, 107 Mass. Reports, 37, 41. This position is not universally accepted. See *Merri-man v. Social Manufacturing Co.*, 12 R. I. Reports, 175, 184.

has been well said, "seemed all of a sudden to give to the judicial department a unity like that of the executive, to concentrate the whole force of that department in its chief, and to reduce the side justices to a sort of cabinet advisers."¹

In some of the State Supreme Courts in early days, it was the practice for the Chief Justice to deliver an opinion in every case, but his associates frequently added concurring or dissenting ones.

Of late years the business of appellate courts in the United States and in most of the States is so considerable that it is necessary to divide the labor, and the cases are generally distributed equally for the preparation of opinions.

It is the prevailing practice to have the opinion, when drafted by the judge to whom that duty is assigned, typewritten or printed, and a copy sent to each of the other judges for their consideration separately. At a subsequent conference each judge is called upon by the Chief Justice to state whether he concurs in it, and if alterations are proposed there is opportunity for their discussion. This practice did not become general until the latter part of the nineteenth century, when the typewriter had come into common use. Prior to that time the draft opinion was ordinarily first made known by its author to the other judges either by reading it aloud at the final consultation or by sending one manuscript copy around to each in succession for his indorsement of approval or disapproval. In some courts it was never thus submitted at all, and so they were occasionally committed to

¹ Thayer, "John Marshall," 54.

positions which they had never intended to adopt and afterwards found it necessary to repudiate.¹

Our courts of last resort generally have before them a printed statement of the doings in the lower court which they are asked to review, and a printed argument from each party to the appeal. Oral arguments are also usually heard, except in a few States where the press of business renders it practically impossible except in cases of special importance. Such a press occurs mainly in the largest States, but exists also in some whose Constitutions make it easy and overcheap for every defeated litigant to carry his case up to the highest court.

In the Supreme Court of Georgia no costs exceeding \$10 can be taxed against the unsuccessful party; and it has had eight hundred cases in one year upon its docket. In most States he has substantial costs to pay. These mainly are to meet the expense of printing the record sent up from the court below. A single case will sometimes fill a volume or even a set of volumes, particularly in equity causes in the federal courts, in which all the testimony is generally written out at length. The appellant has to pay for the printing in the first instance, but ordinarily, if he succeeds, the other party will be obliged to reimburse him. The cost involved is occasionally several thousand dollars.

The party taking the appeal must file a paper stating his grounds for it separately, distinctly, clearly and concisely. There is a temptation to include all that can be thought of, good, bad and indifferent; and

¹ See for an example of this *Wilcox v. Heywood*, 12 R. I. Reports, 196, 198.

whether this is done or not will depend largely on the opinion which the lawyers have of the ability of the court.

In the smaller States the judges have time to enable all to study each case with care. In the largest ones it is not uncommon to assign every case on the docket, in advance of the argument, to a particular judge. He is expected to give it special attention with a view to reporting his conclusions upon it to the court, and, should they be approved in consultation, to writing out its opinion subsequently. The assignment for a term of court is not infrequently made in the order in which the docket (or printed list of cases to be heard) is made out, the chief justice taking the first case, the senior associate justice the second, and so on. At the next term the same practice will be pursued, except that the justice next in seniority to the one who had the last case under the previous assignments will now take the first case on the new list, and the next junior justice the second.

Appellate courts generally sit not over four or five hours a day; this time being either preceded or followed by a consultation. They are seldom in session more than five days in the week. The cases before them are not usually assigned for argument on particular days. A list is made up of all which are ready to be heard, numbered in order, the oldest first. They are then taken up successively as reached, and the counsel concerned in each must be ready at their peril. Often a limit is fixed by rule as to the number of cases that can be called for argument in any one day. In the Supreme Court of the United States this is the

practice, and the number is ten. In some of the States it rises as high as twenty.

At the first consultation over a case which has been argued, the Chief Justice (unless a special assignment has been previously made of it to some particular member of the court) asks the junior justice his opinion as to the proper disposition to be made of it, and each justice in turn then gives his, in the reverse order of seniority. If there is any serious disagreement the matter is generally allowed to stand over for further discussion later. At some convenient time after the views of the various justices have been ascertained the cases are distributed and, as a rule, equally for the purpose of preparing the opinions. This distribution is sometimes made by the Chief Justice and sometimes by agreement, or according to the arrangement of the docket.

Until the opinion has been finally adopted it is not usual to announce the decision. Not infrequently the ultimate decision is made the other way, and a new opinion prepared by the same, or, if he remains unconvinced that his first one was wrong, by another judge. Still more often the draft opinion is altered in material points to meet criticisms and avoid dissent.

Dissenting opinions are comparatively rare, particularly in courts where there is a Chief Justice with the qualities of a leader; that is, with ability, learning and tact, each in full measure.¹ Every instance of dissent

¹ Perhaps tact counts the most, for the Chief Justice has the advantage of hearing the opinions of all his associates at all consultations before he gives his own. Senator Hoar makes a pungent comment on Chief Justice Shaw's want of it, in his *Autobiography*, II, 413.

has a certain tendency to weaken the authority of the decision and even of the court. Law should be certain, and the community in which those charged with its judicial administration differ irreconcilably as to what its rules really are, as applied to the transaction of the daily business of life, will have some cause to think that either their laws or their courts are defective and inadequate. For these reasons judges of appellate courts often concur in opinions, of the soundness of which they are only convinced because of the respect they entertain for the good judgment of their associates. They are willing to distrust themselves rather than them.

Not seldom, however, dissent and the preparation of a dissenting opinion has in the course of time, aided, perhaps, by some change of membership, converted the court and led to overruling a position incautiously taken which was inconsistent with settled law.¹

More than eighty out of every hundred of the opinions delivered in the courts of last resort of each State of the United States, excepting one (New Jersey), and contained in the last volume of the reports of each published prior to June, 1904, were unanimous. In New Jersey seventy-three out of every hundred were. In two States, Maryland and Vermont, there was dissent in but two out of every hundred cases, and in all the States taken together, out of nearly 5,000 cases decided a dissent is stated in 284 only. This made the proportion of unanimous de-

¹ A striking instance of this is the case of *Sanderson v. Pennsylvania Coal Co.*, 86 Pennsylvania State Reports, 401; 94 *id.*, 302; 102 *id.*, 370; 113 *id.*, 126; 6 Atlantic Reporter, 453.

cisions of State courts, in the country at large, to those in which there was dissent nineteen to one.¹

A dissenting judge sometimes files an opinion which is then printed in full in the reports. More often the fact of his dissent is simply noted. In cases involving constitutional questions it is rare for a dissenting judge not to state his reasons. The importance of the subject justifies if it does not demand it. As Mr. Justice Story once observed, "Upon constitutional questions the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent."²

The official reports of the courts have some of the faults of officialism. They often do not appear until long after the decisions which they chronicle have been made and their general make-up is sometimes unworkmanlike and unscientific. It requires rare gifts to make a good reporter of judicial opinions. He must have the art of clear and concise statement; the power to select what is material and drop the rest; and the faculty of close analysis of abstract reasoning.³ Many of our reporters also are practicing lawyers of no special training for the work, and who give to it but a portion of the year.

The modern sense of the value of time, of scientific treatment of whatever can be treated scientifically, and of uniformity in scientific methods led toward

¹ *Law Notes* for June, 1904, p. 285.

² *Briscoe v. Bank of Kentucky*, 11 Peters' Reports, 257, 349.

³ Four of the reporters of the Supreme Judicial Court of Massachusetts have been appointed justices of that court, largely in consequence of their good work in reporting. A good reporter always has the making of a good judge.

the close of the nineteenth century to competition in reporting. Private publishing houses undertook the prompt publication, in scientific arrangement upon a uniform plan, of the opinions of the courts. This work began in 1879. The result has been that the series of official reports of the Circuit Court of Appeals of the United States has been discontinued, and that the decisions of all our other appellate courts are now twice reported. One publishing house has grouped the States into clusters, issuing for each cluster its own series of reports, known, respectively, as the Atlantic, the Northeastern, the Northwestern, the Southeastern, the Southern, the Southwestern and the Pacific Reporters. The States forming each group have been selected mainly because they were neighbors geographically, but partly from commercial reasons. Thus Massachusetts, which would naturally be assigned to the Atlantic Reporter, has been put into the Northeastern; and such inland States as Kansas and Colorado find their place in the Pacific Reporter. All the reported decisions of all the States in each group are printed in pamphlet form weekly, as they may be handed down, in chronological order; and every few months the whole issued as a bound volume. In this way, for a trifling sum a copy of any opinion of any American court of last resort can be had in a few days or weeks after its announcement, and a lawyer's library can, at slight expense, be furnished with the decisions not only of his own State but of several others having not unlike laws and institutions.

The multiplication of American reports makes judicial precedents of decreasing value to the American

lawyer. English cases are cited as authority far less frequently than they were before the middle of the nineteenth century. The omnipotence of Parliament and the free hand with which that has been exerted to change the common law have tended to separate English from American jurisprudence. Our written Constitutions have perpetuated here ideas of government and property which England does not recognize. Hence American precedents are of more use than English. But American precedents are becoming so numerous that the advocate who seeks to avail himself of them is tempted to cite too many and to examine them with too little care. In each State its own reports are the expression of its ultimate law. With these every member of its bar must be familiar. But the courts before which he argues listen to him with more satisfaction and greater benefit if he deals with the principles of law rather than with foreign precedents which may or may not correctly apply them.¹

Not every opinion which is delivered is officially reported. In most States the court has and exercises the power of directing that such as they may deem of no substantial value to the profession at large shall not be. Many are simply applications of familiar rules which obviously control. Opinions of that kind interest only the lawyers in the cause. In the unofficial reports, however, such cases are sure to appear and the bar is divided in opinion as to whether they should not also be given a place in the official ones.

It is not always easy for the court or the reporter

¹ See a valuable statistical article on "Reports and Citations" in *Law Notes* for August, 1904.

to determine what decision may thereafter be relied on as a precedent. Repeated instances have occurred in which such a use has in fact been made and properly made of some not noted in the regular reports, and not infrequently they have subsequently been inserted in them.¹ There is also in case of an opinion not to be officially reported a loss of a valuable safeguard against unsound decisions. A judge writes with more care and examines the points of law which may be presented more closely if he writes for the public and for posterity.

On the whole the prevailing sentiment is that the reasons for repressing some are stronger than those for publishing all judicial opinions. It will be few only that, under any circumstances, will be omitted. The leading lawyers in every State are expected to run over, if they do not read, every case in every new volume of its reports. Every case dropped lightens this task. It helps to keep indexes of reports and digests of reports and legal treatises within reasonable limits. It cuts into an accumulating mass of material, most of which must, in any event, so far as points of law are concerned, be a mere repetition of twice-told tales, that is becoming so vast in the United States as to becloud rather than illuminate whoever seeks to know what American law really is.

¹ In the centennial volume (Vol. CXXXI) of those of the Supreme Court of the United States, one hundred and twelve opinions are printed, the first delivered over fifty years before, which previous reporters had thought best to omit, and two hundred and twenty-one more such are published in Vol. CLIV. Whoever runs them over will be apt to think that the previous reporters were right.

If reporters will not select and discriminate between adjudged cases publishers can and will. Many sets have been prepared and issued in recent years of selected cases on all subjects taken from the official reports of all the States. Their professed aim has been to include all worth preserving. In fact, they have naturally been guided to a considerable extent by commercial considerations. To every lawyer the leading cases in his own State are of the first importance. He is not likely to buy any compilation in which a number of these do not appear, even if intrinsically, as statements of law, they may be of no great value. Hence in the collections in question the rule of selection is often the rule of three, and they are apt to contain a certain proportion of the decisions of every State.

The leading sets are the "American Decisions," running from 1760¹ to 1869; the "American Reports," from 1869 to 1886; the "American State Reports," from 1886 to the present time, which three sets include over two hundred and fifty volumes and nearly 40,000 opinions; and the "Lawyers' Reports Annotated," now extending over more than sixty volumes, the first of which was published in 1888, and contains no cases reported prior to the preceding year.

Spencer's rule of social evolution that all progress is from the homogeneous to the heterogeneous tends steadily and inexorably in the United States to lessen the value of judicial reports out of the State in which

¹ Long after the publication of Kirby's Reports in 1784, some unofficial reports were published of cases decided in colonial courts prior to any which he included.

the cases were decided. Each of forty-five different commonwealths is building upon legal foundations that are not dissimilar, but some of them are advancing far faster than others, and none proceed at exactly the same rate or on exactly the same lines. They are building by statute, by popular usage and by judicial decision. Heterogeneity is most marked in legislation and it tells most there. Whoever looks over a volume of reports will find a large proportion of the cases turning upon some local statute. An important index title is that of "Statutes Cited and Expounded." In Vol. 138, for instance, of the Massachusetts Reports (a volume selected at random for this purpose), 223 statutes or sections of statutes are noted as having been made the subject of remark in the 170 cases which it contains. Almost all are Massachusetts statutes, a very small proportion of which have been re-enacted elsewhere.

Appellate courts thus forced at every turn to study with care into the effect of local legislation, much of which, to get at its meaning, must be traced back historically through various changes during a long course of years, and in the older States sometimes for centuries, listen unwillingly to citations from decisions of other States which are even remotely affected by the statutes that may be there in force.

The newer States and those with a small population are naturally the ones that rely most on foreign authority. In the last volume (Vol. 26) of the Nevada Reports, sixty-two per cent. of the cases cited in the opinions of the court are of that kind. In the last volume (Vol. 178) of the New York Reports, the percent-

age is but thirty, and in the last of the Massachusetts Reports (Vol. 185) it is only twenty-five.¹

In the Supreme Court of the United States and in several of the appellate courts of the larger States each judge is provided with a clerk at public expense. While this is a means of relief from much which is in the nature of drudgery, it sometimes leads to a deterioration in the quality of the judicial opinions. A dictated opinion is apt to be unnecessarily long, and when a clerk is set to looking up authorities, although he can hardly be expected always to select the most apposite, it is easier to accept his work and use what he has gathered than to institute an independent search.

Some of the appellate courts which are most fully employed, both State and federal, are provided with special libraries of considerable extent, and each of the individual judges is also often furnished with an official library, sometimes containing several thousand volumes, for his personal use, to be handed over to his successor when he retires from office.²

In some States counsel have the right to demand to be heard before a full court, and those who have taken the appeal generally exercise it. As decisions go by majorities, the chance of reversing a judgment before, for instance, a court of five, which is a common number, is obviously greater when all its members sit

¹ *Law Notes* for April, 1905, 8.

² In New York, the private library of the Court of Appeals contains over 6,000 volumes, comprehending all the reports of all the States, and the personal libraries provided for each judge have come to comprise 3,500 volumes.

than when four do. In either case it must be the act of three judges, and one is more likely to convince three out of five than three out of four.

In the Supreme Court of the United States there is no means of supplying the place of a judge who is absent or disqualified. The remaining members, provided they constitute a quorum (that is, a majority), proceed without him. In most of the States there is some provision for filling the vacancy in such a contingency. Sometimes it is by calling in a judge of an inferior court; sometimes by application to the Governor for the temporary appointment of some member of the bar as a special associate justice to sit in a particular case.

In several of the larger States all the members of the court of last resort do not and need not sit in every case. In some two permanent divisions are constituted, to each of which certain judges are assigned, and both divisions may be in session at the same time. In other States certain judges are detached for a certain time, during which they study causes which have been argued and prepare opinions. This done, they resume their seats, and others are released for similar duties.

In Ohio, for instance, the Supreme Court consists of six judges and commonly sits in two divisions of three each, having equal authority. The whole court sits to hear any cause involving a point of constitutional law. It also decides those which have been heard in one of its divisions and in which the divisional court is in favor of reversing the judgment appealed from. An affirmance by the divisional court is final, but if it inclines to a reversal the judges communicate

their opinions to the full court, which also reads the printed briefs submitted on the original argument, and then without any further oral hearing pronounces final judgment. Four judges, therefore, at least, must concur to accomplish a reversal. Should the full court in any case be equally divided, the judgment appealed from stands.

Under the Constitution of California (Art. VI, Sec. 2) the Supreme Court, which consists of seven judges, ordinarily sits in two departments. Three judges can render a decision, but the judgment does not go into full effect for thirty days unless three, including the Chief Justice, have given it their approval. The Chief Justice also, with the concurrence of two of his associates, or four of these without his concurrence, can direct that any cause be heard before a full court within thirty days after judgment by a department court. He can also order the removal into the full court of any cause before judgment.

In Michigan only five out of the eight judges sit to hear a case, and if one of them files an opinion dissenting from that of his associates, the losing party can demand a rehearing before the full court.

Neither the bar nor the bench are quite satisfied with such methods of appellate procedure. The Ohio scheme is excellently adapted for the dispatch of business, but may prevent an oral argument before those who are ultimately to decide the cause. That of California often protracts litigation. Any such plan of division also must increase the risk of the court's taking a position inconsistent with one which it had previously assumed. The judges in one division may come

to conclusions different from those reached in the other division; or where the court does not sit in divisions, a point may be determined by a narrow majority in one case which in a later one, through the substitution of one or two judges for those who heard the former, may be ruled the other way.

The freedom of appeal which is generally conceded to defeated litigants in this country has been made the subject of severe criticism. It seems, however, a necessary incident of our political institutions. They are built upon the foundation of a profound reverence for the rights of the individual and of the equality of all before the law. Our Constitutions guaranty every man against deprivation of life, liberty or property without due process of law. If we could count on having as judges of our trial courts none but men of ability, learning and independence, it might be safe to leave it to them to say what this due process was. But the tenure of judicial office in most States is too brief, the pay too meagre, and the mode of appointment too subject to political influence to give always that assurance that could be wished either of the independence of the judiciary or of its representing only what is best in the legal profession.

In England, until recently, there was little or no right of review in favor of one convicted of crime. But the judges are appointed for life on ample salaries, and tradition requires that they be selected only from among the leaders at the bar. Nor is the right of the individual against the State deemed so sacred under English as under American institutions. It cannot

be in any country where an hereditary aristocracy has from ancient times had a share in government. As has been seen, the English practice in this respect for nearly a hundred years was adopted in the courts of the United States, but public sentiment finally pronounced against it. Much less could it be safely followed in the States, where criminal courts are often held by judges of little ability, less learning, and inferior standing at the bar, to which, after the expiration of a brief term, perhaps of but a year, they will return should they fail to secure a party renomination.

The same reasons, if in less degree, support a liberal right of appeal in cases involving property only, and oppose restrictions based only on the amount in controversy. Americans could never tolerate keeping their appellate courts for the trial of large causes only. There must be no rich men's courts. There certainly must be none to which a claim of right founded on a constitutional provision cannot be carried up, however trifling in pecuniary value may be the matter in demand.

Most appeals fail. There are few in which the counsel who takes them are fully confident of success. Every lawyer of large experience knows that he has often won when he expected to lose, and lost when he expected to prevail. There are not many cases involving large pecuniary interests or strong personal feeling that are not appealed if there is any color for it. The proportion of appeals which are successful will generally be not far from a third of the whole number

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taken. Of course, however, this must depend largely on the competency of the trial judges in the court where it is claimed that errors have occurred. The abler and more experienced those who do circuit duty may be, the oftener will their doings be supported in the court of last resort.

Short terms of office and consequent lack of practical acquaintance with the business of a trial judge is the real cause why so many appeals are taken, and are allowed to be taken in our American States. As for the federal courts of appeal, there is another and unavoidable occasion for large dockets. They have the last word to pronounce on constitutional questions, and there has probably never been a year since the United States came into existence when the legitimate powers of the general government have not been repeatedly infringed upon by State legislation.

In the Supreme Court of the United States, the reporter began its second century with a plan of stating the number of cases affirmed or reversed at each term, but dropped it after two years. The record of these years was as follows:

	Affirmed	Reversed
October Term, 1890.....	248	104
October Term, 1891.....	185	103

A tabulation of the decisions reported in the various States in their last volumes published prior to June, 1904, shows that on a general average, in sixty-three out of every hundred appeals the judgment of the inferior court was affirmed. In Massachusetts the percentage was eighty-seven per cent. In Texas it was

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only thirty-four per cent., and in Arkansas and Kentucky not much over forty per cent.¹

Many more appeals are taken by convicted persons in criminal cases at the South than in the North. Many more criminal prosecutions are brought there, in proportion to the population. This is due largely to the presence of so large a body of colored people, most of whom have had a very inferior education and training. Many more such appeals are successful also in the South than in the North. In the reports of the courts of last resort of Alabama, Florida, Louisiana and Mississippi between December 20, 1902, and April 25, 1903,² ninety-four criminal cases appear, in forty-six of which the judgment of conviction was set aside. In Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island and Vermont between March 12 and June 25, 1903,³ the reports show only twenty such cases, of which seven were set aside.⁴ This would seem to indicate either that the trial judges of criminal courts in the Gulf States are careless or that the appellate courts there (under the pressure, perhaps, of unwise statutes)⁵ are inclined to be too technical. If either is true it is a just cause for public dissatisfaction with the administration of criminal justice, and

¹ *Law Notes* for June, 1904, p. 285.

² As given in Vol. XXXIII of the Southern Reporter.

³ As given in Vol. LIV of the Atlantic Reporter.

⁴ *Law Notes* for September, 1903, 105.

⁵ See Paper on "Judicial Independence," by Justice Henry B. Brown in the Reports of the Am. Bar Association for 1889, 265.

some palliation for the frequent resorts to Lynch law by the Southern people.

The American plan of written opinions, at least in all cases of novelty or general interest, works better in small States than in large ones. No judge can find time to prepare more than a certain and quite moderate number in a year, if they are such as they should be. The shorter they are, the more time generally has been spent in condensing them. In a great State there must, therefore, either be a larger number of judges, or every few years there must be a temporary addition to the judicial force to clear off an accumulation of cases. The latter expedient is generally preferred. Sometimes a small number of lawyers are selected to serve as a special commission of appeals. They sit by themselves, but there may be a provision for their submitting their opinions to review by the regular court. Some of the leading cases in our reports have been decided by such commissioners. In California, where such a body now exists, its members are appointed by the court, and removable at its pleasure; but ordinarily they are chosen by the executive or legislative departments.

Sometimes when the cases on the docket of the court of last resort reach a certain number (in New York this is put at 200) the Governor may call in judges of the next court in rank to sit with the regular judges until the accumulation is cleared off.

Fewer causes can be heard and disposed of in American appellate courts than in those of other countries by reason of two things, our practice of de-

livering written opinions and the fulness of treatment thought necessary in such opinions, especially when they deal with questions of constitutional law. In France, the Court of Cassation in 1901 heard 816 appeals.¹ Nothing approaching this number could be properly disposed of on the merits in any American Court of last resort. Many appeals, however, are here, as everywhere, abandoned or dismissed for some failure to comply with the rules of practice or because manifestly frivolous, and in these no opinions are ordinarily given. During the court year closing with the Summer of 1903, the Court of Appeals of New York filed only 221 opinions, although it disposed, in one way or another, of 640 cases; and the Supreme Court of the United States filed 212 opinions and disposed of 420 cases.²

In the calendar year 1904, the Court of Appeals of New York filed 327 opinions, and the Supreme Court of Illinois over 500.

¹ Of these, 219 were sustained and 597 rejected.

² See Chap. xxiv.

CHAPTER XX

THE ENFORCEMENT OF JUDGMENTS AND PUNISHMENT OF CONTEMPTS OF COURT

No court can with propriety pass a decree which it cannot enforce.¹ After the judgment comes the issue of appropriate process to compel obedience to it, unless such obedience (as is generally the case) is voluntarily rendered. The whole power of government is at the command of the court for this purpose. A sheriff with a judicial process to serve who meets with resistance can summon to his aid the *posse comitatus*. By this term is meant the whole power of his county; that is, any or all of its able-bodied inhabitants on whom he may choose to call. Not to respond to such a call is a legal offense. The marshals have similar powers in serving process from the Federal courts.

The fact that there is this force behind a writ is so well understood by the community that occasions for resorting to its use, or indeed to the use of any actual force, are extremely rare. If the process was lawfully issued, it would be useless to resist. If unlawfully, it is easier and safer to seek relief by an injunction, or in case of an arrest, by a writ of *habeas corpus*. But there have been occasions in the judicial history of the

¹ Clarke's Appeal from Probate, 70 Conn. Reports, 195, 209; 39 Atlantic Reporter, 155; 178 U. S. Reports, 186.

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United States when, under the influence of a general popular ferment, the service of process from the courts, and even the holding of courts, have been forcibly prevented.

Shay's Rebellion in Massachusetts (in 1786) was the first of these after the Revolution. Similar uprisings of less importance took place at about the same time in New Hampshire and Vermont. A few years later, the service of process from the New York courts was interrupted in Columbia County. There was a strip of territory adjoining the Hudson River, title to which was claimed both by New York and Massachusetts. Conflicting claims, awaking much bitter feeling, arose under grants from each government. In 1791, the sheriff of Columbia County was ordered by the courts, in the course of a lawsuit, to sell a tract of this land. Seventeen persons disguised as Indians appeared at the time of sale to resist it, and he was killed by a shot from one of them.¹

Then came the Whiskey Rebellion in Pennsylvania. The statutes of the United States² provide that if their courts meet with opposition of a serious nature, the President may use the army or call out the militia of one or more States to restore order. Opposition to the enforcement of the revenue tax on whiskey in 1794 called for the first exercise of this power. Marshals were resisted in serving process, and several counties were in a state of insurrection. Washington sent so large a force of troops to suppress it that the rioters vanished on their approach, and there was no further

¹ Report Am. Historical Association for 1896, I, 152, note.

² United States Revised Statutes, 5299.

obstruction of the ordinary course of justice. The total expense to the government in this affair was nearly \$1,000,000.¹ In 1799, somewhat similar opposition arose in the same State against the enforcement of the house taxes laid by Congress. President Adams here also sent a sufficient force of militia to suppress it.²

In 1839, a general combination was formed among the tenant farmers in New York holding long or perpetual leases from manorial proprietors to resist the payment of the stipulated rents. In several counties the greater part of the land was occupied under such a tenure. The design was to compel the landlords to sell to the existing tenants at a price fixed by public appraisal, or else that the State should take the lands by eminent domain and dispose of them to the same persons on reasonable terms. Sheriffs were forcibly prevented from serving writs in dispossession proceedings. One who took with him a *posse comitatus* of five hundred armed men, a hundred of whom were mounted, was met and turned back by a larger band, who were all mounted. The Governor was finally compelled to issue a proclamation against the "up-renters," as they were called, and to protect the sheriff by a large body of militia. Put down in one county, the movement soon reappeared in others. Disguises were assumed, the rioters figuring under Indian names and wearing more or less of the Indian garb. Three hundred of them, with twice that number not in disguise, prevented a sheriff from levying an execution

¹ Wharton's "State Trials," 102.

² *Ibid.*, 48, 459.

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for rent on tenants upon the Livingston manor. For six years the contest went on in several counties. Several lives were lost on both sides. Sheriff's officers were tarred and feathered and their writs destroyed. Of the rioters many were arrested and prosecuted from time to time and some convicted. Five were sent to the State's prison for life. Two were sentenced to be hanged. The State used its militia freely to defend the sheriffs, at a cost in one county of over \$60,000, and in 1845 a series of prosecutions and convictions, resulting in over eighty sentences at one term of court, broke the back of the insurrection. It died half-victorious, however, for an "anti-rent" Governor and Lieutenant-Governor were elected the next year, and several statutory changes in the law of leases which the malcontents had desired were soon afterwards enacted.¹

During the period of reconstruction in the Southern States, following the civil war, the courts were repeatedly broken up by violence and the service of legal process resisted, in some instances by authority of the military Governor.²

The writ to enforce the judgment of a court of law is called an execution. It is directed to the sheriff or other proper executive officer, and requires him to seize and sell the defendant's property or, as the case may be, to arrest and imprison him, to turn him out of

¹ See Paper by David Murray on the "Anti-rent Episode in New York," Report of the American Historical Association for 1896, I, 139.

² S. S. Cox, "Three Decades of Federal Legislation," 469, 472, 495, 496, 509, 544, 565.

possession of certain lands, or to take some other active step against one who has been adjudged in the wrong, in order to right the wrong, as the judgment may command.

A judgment for equitable relief is not ordinarily the subject of an execution.¹

A judgment at law is generally to the effect that one of the parties shall recover certain money or goods or land from the other. On the prevailing party lies the burden of moving to get possession of what has thus been adjudged to be due. This he does by taking out an execution. A judgment in equity is an order on the defendant to do or not to do some particular act. It is now an affair between him and the court. He must obey this mandate or he will be treating the court with disrespect.

To treat a court with disrespect, or, in legal parlance, to be in contempt of court, is to incur very serious responsibilities. It is in the nature of a criminal wrong, for it is a direct opposition to the expressed will of the State. Whoever is guilty of it makes himself liable to arrest and to be subjected to fine or imprisonment. If, for instance, an injunction is obtained in a suit for the infringement of a patent right, it becomes at once the duty of the defendant to desist from making or selling what the plaintiff has proved that he only can lawfully make and sell. If he does not desist, the plaintiff can complain to the court, and if after a preliminary hearing it appears that his complaint is well founded, can obtain a warrant of arrest, styled a "process of attachment." On this, the

¹ See Chap. VIII.

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proper officer takes the defendant into custody, and brings him before the court to answer for violating the injunction order. If the case is an aggravated one, he will be both fined and imprisoned, and the imprisonment will be in the common jail for such time as the court may order.

It is the sting in the tail of an injunction that makes it especially formidable. The debtor who fails to pay to the sheriff, when demand is made upon an execution, a judgment for money damages commits no contempt of court. The man who keeps on doing what a court of equity has forbidden him to do does commit one.

A conspicuous instance of the efficacy of an injunction was furnished by the great Chicago railroad strike and boycott of 1894, initiated by the American Railway Union. Mob violence followed. More than a thousand freight cars were burned. Trains were derailed, passengers fired at, and lives lost. The officers of the union, after two or three weeks, wrote to the managers of the railroads principally affected, describing the strike as threatening "not only every public interest, but the peace, security and prosperity of our common country."¹ A temporary injunction was issued against these officers and others by the Circuit Court of the United States in an equitable action brought by the United States under the direction of the Attorney-General. They disobeyed the injunction. Their arrest for this contempt of court promptly followed. This stopped the flood at its source. To quote from testimony given a few weeks

¹ *United States v. Debs*, 64 Federal Reporter, 724, 729.

later by Mr. Debs, the President of the Union, "As soon as the employees found that we were arrested and taken from the scene of action, they became demoralized and that ended the strike. . . . The men went back to work and the ranks were broken and the strike was broken up, . . . not by the army, and not by any other power, but simply and solely by the action of the United States court in restraining us from discharging our duties as officers and representatives of our employees."¹ The defendants in the contempt proceedings having been found guilty and sentenced to jail for terms varying from three to six months, appealed to the Supreme Court of the United States, but without avail.²

Injunctions not infrequently are granted as an equitable relief against a legal judgment. *Summum jus, summa injuria* is an ancient maxim of the courts. The foundation of equitable jurisdiction is that courts of law cannot always do justice. One may, for instance, be invited to build a house on another's land, and promised a deed of the site. He builds the house and then is refused a deed. The invitation and promise were by word of mouth. The rules of law make such a house the legal property of the landowner. The rules of equity make it the equitable property of the man who built it on the faith of the landowner's invitation and promise. If the latter sue at law for the possession of the house, he may get judgment, but equity will prevent his enforcing the judgment, not because it is not a legal judgment, but

¹ United States v. Debs, 64 Federal Reporter, 724, 759.

² *In re* Debs, 158 U. S. Reports, 564, 600.

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because he is endeavoring to make an inequitable use of a legal right.

A court of equity sometimes makes a decree establishing a title. To enforce such a judgment, a writ may be issued, called a writ of assistance. It is directed to the sheriff and requires him to do some specific act, such as putting the defendant out of possession of certain lands and turning it over to the plaintiff.

It is, as appears from instances which have been given, possible that the execution of process from the courts may be defeated by violence which they cannot overcome. It is possible in fact though impossible in theory. As the sheriff can employ the *posse comitatus*, he ought always to have an overwhelming force at his command. But it is easier to "call spirits from the vasty deep" than to make them respond. Public feeling may be so strong in opposition to the service of the process that mob violence will be tolerated and even openly supported. An armed mob can only be effectually met by an armed force which is not a mob—that is, by disciplined soldiers.

The sheriff, if so opposed, may call upon the Governor of the State for military assistance. How efficient it will prove will, of course, depend on the discipline of the militia and the firmness of its commanding officers. It is seldom that it fails to restore order, if the men carry loaded guns and are directed to fire at the first outbreak of forcible resistance.

But the Governor may refuse to comply with the sheriff's request. In such case, the execution of the

process of the court fails because of want, not of power, but of the will to exercise it on the part of those on whom that duty rests. In every government constituted by a distribution of the supreme authority between different departments, each of them must do its part loyally with respect to the others, or the whole scheme, for the time being, breaks down.

In the United States this danger is doubly great because of the interdependence of the general government and the particular States. Judicial process may issue from a State court against those who oppose its execution under claim of authority from the United States; or from a federal Court against those who oppose its execution under claim of authority from a State. Some instances of such conflicts of jurisdiction have been already mentioned.¹

When the Supreme Court of the United States reverses a judgment of a State court, it can either² itself render the judgment which the State court ought to have rendered, and issue execution, or remand the cause to it with directions that this be done. If the latter course be taken, the directions may be disobeyed. A Georgia court was guilty of this contumacy in the case of *Worcester v. Georgia*.³ If the former course be taken, the service of the execution may be resisted by the power of the State.

Worcester was illegally confined in the Georgia penitentiary. The sentence against him had been set aside and the indictment adjudged to furnish no

¹ Chap. x.

² U. S. Revised Statutes, Sec. 709.

³ 6 Peters' Reports, 515, 596.

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ground of prosecution. But if the Supreme Court had rendered a judgment dismissing the prosecution, and given a writ to the marshal directing him to set Worcester at liberty, the officer would have found the prison doors shut in his face. Every prison is a fortress, so built as to prevent rescue from without as well as escape from within. To lay siege to one would be too great an enterprise for the marshal to undertake without military assistance. For this the President could have been called upon. But he might have refused it. If so, the judgment of the judicial department would have proved inoperative, simply because the officer charged with the duty of rendering it operative had declined to fulfil that duty.

The Supreme Court, in the Worcester case, probably had reason to believe that if it had directed a call on President Jackson for a military force it would have been refused. It is reported that the President, in private conversation, intimated as much. Possibly he might have been justified in the refusal. South Carolina was on the brink of war with the United States. Georgia was her next neighbor, and might have been induced to make common cause with her, if Jackson had battered down the doors of her penitentiary to release a man who, her courts insisted, had been properly convicted of a serious crime. A court can do nothing short of justice. The executive power, perhaps, may sometimes rightly act or decline to act from motives of national policy.

In one instance the armed forces of a State were actually engaged, under the authority of the legislature, in forcibly resisting the service of process from

the federal courts. It was in 1809, when the marshal in Pennsylvania was opposed by a large body of the militia called out by order of the Governor for the purpose. Their commanding officer was subsequently arrested and convicted for the offense in the Circuit Court of the United States.¹

In 1859, the Governor of Ohio refused to honor a requisition from the Governor of Kentucky for the surrender of a fugitive from justice. The act charged was assisting a slave to escape. This was a crime in the State from which the man had fled, but not in the State where he had found refuge. The Supreme Court of the United States was asked by Kentucky to compel the surrender. It held that the Governor had violated his duty, but that the Constitution of the United States furnished no means for enforcing its performance by him.² Under the shelter of this doctrine, a man indicted for murder in Kentucky has been for several recent years residing in safety in Indiana, because the Governor of that State has refused to comply with repeated requisitions for his surrender.

Every court of record while in session has inherent power to compel all who appear before it to preserve order, to obey its lawful commands issued in due course of judicial procedure, and to refrain from any expressions of disrespect to its authority, under

¹ Wharton's State Trials, 48; McMaster, "History of the People of the U. S.," V, 405; Willoughby, "The American Constitutional System," 41, 43.

² Kentucky v. Dennison, 24 Howard's Reports, 66, 109.

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pain of fine or imprisonment, or both. This power, unless withdrawn by statute, belongs to any justice of the peace who has authority to hold a court of record, while he is holding one. Commonly it is, in his case, regulated by statute.¹

At common law, superior courts of record also have power during the progress of a cause to repress or punish any disrespectful acts or words done or uttered, not in its presence, but so near to it as to constitute a breach of order or tend directly to lessen its efficiency. These are deemed powers inherent in such a court, because necessary to support its proper dignity and independence. Statutes are common to define or restrict them, but they cannot take them away altogether. To do so would be to take away an essential incident of the judicial power. Nor can they so far reduce the penalty that may be inflicted as to deprive the court of a reasonable measure of the right of self-protection.² It is, to say the least, doubtful if they can even restrict its exercise by any court created by the Constitution itself.³

The accused is not entitled as of right to a trial by jury. The judge is the best guardian of the dignity of the court.⁴

The rule of criminal law that to convict a man of crime requires proof of guilt beyond a reasonable

¹ *Church v. Pearne*, 75 Conn. Reports, 350; 53 Atlantic Reporter, 955.

² *Batchelder v. Moore*, 42 California Reports, 412.

³ *State v. Morrill*, 16 Arkansas Reports, 384; *State v. Shepherd*, 177 Missouri Reports, 205; 76 Southwestern Reporter, 79; *Ex parte Robinson*, 19 Wallace's Reports, 505, 510.

⁴ *In re Debs*, 158 U. S. Reports, 564, 595.

doubt applies to all proceedings of contempt. The accused is also allowed to go free on giving bail until final sentence, if that is to be preceded by any preliminary inquiry involving adjournments from day to day. No such inquiry is necessary when the contempt is plain and was committed in the presence of the court.

In the courts of the United States and in most of the States no appeal is allowed for errors in law from a summary sentence of punishment for a contempt of court. Appeals lie only from final judgments in a cause, and such a sentence for contempt is not so regarded.¹ If the contempt be (as it may be) made the subject of a formal criminal prosecution and a jury trial, an appeal is allowed.

A punishment inflicted for contempt, even though it goes beyond the rightful jurisdiction of the court in such a matter, is a judicial act, and does not expose the judge passing the sentence to an action for damages.²

¹ *Ex parte Bradley*, 7 Wallace's Reports, 364, 376.

² *Bradley v. Fisher*, 13 Wallace's Reports, 335.

CHAPTER XXI

JUDICIAL PROCEEDINGS IN TERRITORY SUBJECT TO MARTIAL LAW

MARTIAL law is the exercise of military power. It is martial rule at the will of the commanding military officer.

In time of war and at the seat of war martial rule is a necessity, and under such conditions martial law may rightfully be enforced by any sovereign as an incident of the war, whether that is being waged with foreign or domestic enemies. The case is different when, though war exists, an attempt is made to enforce martial law at a place which is not the seat of war, nor so near it as to make military rule necessary for military success. Constitutional provisions may also affect the question. Those affecting the United States contain limitations stricter than those found in some of the State Constitutions. Ordinarily no military officer can rightfully enforce martial law in a place where the regular courts of his sovereign are open and in the proper and unobstructed exercise of their jurisdiction.¹

The first serious contest between the judiciary and the military power in this country as to the questions thus involved took place during the war of 1812. General Jackson, in 1814, was at New Orleans in command

¹ *Ex parte* Milligan, 4 Wallace's Reports, 2, 127.

of the military Department of the South. The city was threatened with invasion. He declared martial law, and not long afterwards arrested a Mr. Louaillier, a member of the State legislature, for writing a newspaper article in which he objected to the continuance of this kind of military government. Louaillier obtained a writ of *habeas corpus* from the District Judge of the United States (Judge Hall), directed to Jackson. The General, instead of obeying it, forthwith took possession of the original writ, arrested the Judge, and deported him from the city. Two days later despatches were received from the War Department officially announcing the conclusion of a treaty of peace. Judge Hall now returned, and a rule to show cause why Jackson should not be attached for contempt of court was issued. Jackson appeared and filed a long answer, first stating various objections to the jurisdiction, and then setting up the circumstances calling for his proclamation of martial law. He had been told, he said, that the legislature was "politically rotten." The Governor had warned him that the State was "filled with spies and traitors," and advised, in the presence of Judge Hall, and with no dissent from him, that martial law be proclaimed. It seemed a time when "constitutional forms must be suspended for the permanent preservation of constitutional rights." The lengthy paper, which was evidently written by a skilful lawyer, closed thus: "The powers which the exigency of the times forced him to assume have been exercised exclusively for the public good; and, by the blessing of God, they have been attended with unparalleled success. They have

saved the country; and whatever may be the opinion of that country, or the decrees of its courts in relation to the means he has used, he can never regret that he employed them."¹ The court, not particularly impressed with these arguments, ordered the proceedings to go forward and required the General to answer certain interrogatories respecting his course of conduct, by a day appointed. He appeared on that day and declined to answer them, with this concluding shot:

"Your honour will not understand me as intending any disrespect to the court; but as no opportunity has been afforded me of explaining the reasons and motives by which I was influenced, so it is expected that censure will constitute no part of that sentence, which you imagine it your duty to pronounce."²

The sentence was a fine of \$1,000, which was at once paid.

The sympathy of the country was with "the hero of New Orleans" in this affair, whose gallant defense of that city had cast a gleam of glory upon the close of a long and apparently fruitless war. Some of her people subscribed the money to reimburse to him the amount of the penalty, but he declined to accept it. Nearly thirty years afterwards Congress made an appropriation for the purpose, and he received the full amount with interest (in all \$2,700) from the treasury, as a legislative compensation for a judicial wrong. It would seem, however, that Judge Hall acted within the limits of his authority. When he

¹ Reid and Eaton's "Life of Andrew Jackson," 408, 423.

² *Ibid.*, 387.

signed the writ of *habeas corpus* the State was at peace, and it was generally known, though not officially proclaimed, that a formal treaty of peace had been signed between the United States and Great Britain. The courts were open; his court was open; and the General should have respected the process which issued from it.¹

During the Civil War, President Lincoln was responsible for many arrests by military officers of citizens of States remote from the seat of actual hostilities, and in which the courts were open. At its first outbreak he entirely suspended the privilege of the writ of *habeas corpus*, and one issued by the Chief Justice of the United States was disobeyed.² Congress in 1863 enacted that any order of the President, or under his authority, in the course of the war, should be a defense to any action in any court for what was done by virtue of it. The State courts disregarded the statute. If, they said, either the common law or martial law justified the order, it justified the act; if neither did, the fiat of Congress cannot make the act a lawful one.³ The Supreme Court of the United States had this question before them, but did not find it necessary to decide it.⁴ Had they done so, it would probably have been answered in the same way.

¹ *Johnson v. Duncan*, 3 Martin's La. Reports, O. S., 530. See opinion of Mr. Justice Miller in *Dow v. Johnson*, 100 U. S. Reports, 158, 193; *Ex parte Milligan*, 4 Wallace's Reports, 2, 127.

² *Ex parte Merryman*, Taney's Decisions, 246.

³ *Griffin v. Wilcox*, 21 Indiana Reports, 370.

⁴ *Bean v. Beckwith*, 18 Wallace's Reports, 510; *Beckwith v. Bean*, 98 U. S. Reports, 266. (See the dissenting opinion of two justices in the last report, p. 292.)

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Missouri inserted in her Constitution of 1865 a provision similar to the Act of Congress. This, of course, so far as that State could do it, abrogated any rule of law to the contrary, and it was held not to contravene any provision of the Federal Constitution.¹ The transaction in controversy, however, was before the adoption of the fourteenth amendment, and had the prohibition in that been then in existence, a different result would probably have been reached.

The Governor of North Carolina (William W. Holden) in 1870 declared two counties in a state of insurrection. The militia were called out and a number of citizens arrested. Writs of *habeas corpus* in their favor were issued by Chief Justice Pearson of the Supreme Court of the State against the military officers.² They at first refused, by the Governor's authority, to obey them. Similar writs were then obtained from the District Judge of the United States, upon which the petitioners were, by the Governor's orders, produced before the State judge. The result was the impeachment of Governor Holden and his removal from office.³

While martial law is the will of the commanding officer, it may be his will to have it applied, so far as ordinary matters of litigation are concerned, by courts. For that purpose, when in occupation of enemy's territory, he may allow the courts previously existing under the government of the enemy to con-

¹ *Drehman v. Stifle*, 8 Wallace's Reports, 595.

² *Ex parte Moore*, 64 North Carolina Reports, 802; 65 North Carolina Reports, Appendix, 349.

³ S. S. Cox, "Three Decades of Federal Legislation," 458.

tinue in the exercise of their functions as his temporary representatives; or he can institute new tribunals of local jurisdiction having the name and form of civil courts, and proceeding according to the ordinary rules of administrative justice. All such courts act really as his agents and subject to his control, but in practice he seldom interferes with their judgments. He cannot, however, in establishing such a temporary tribunal, give it the powers of an admiralty court over prize cases. The judgment *in rem* of an admiralty court, condemning a captured ship as a lawful prize of war, is treated as conclusive all over the world; but this is because it is a decree of a competent court, properly established to administer a branch of maritime law which, in its main principles, is part of the law of nations and common to the world. No mere military court on enemy's territory occupies that position.¹

This right of the military commander exists equally on foreign territory in military occupation and on domestic territory, when the ordinary courts of his country are not open. During our Civil War, in 1864, President Lincoln, as commander in chief of the army and navy, set up a "Provisional Court for the State of Louisiana," after the Southern portion of that State had been occupied by the national forces and martial law declared. Judge Charles A. Peabody of New York, who had been a justice of the Supreme Court of that State, was commissioned to hold it and to dispose of both civil and criminal causes. Its docket became at once a full one, and important litigation

¹ *Jecker v. Montgomery*, 13 Howard's Reports, 498, 515.

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was transacted there with general acceptance until the close of the war.¹

In the original proclamation of martial law in Louisiana the commanding officer announced that civil causes between parties would be referred to the ordinary tribunals. One of the State courts, known as a District Court of the City and Parish of New Orleans, the judge of which took the oath of allegiance to the United States, continued to sit and dispose of business in the usual course. A few months later a citizen of New York sued a military officer before it for ravaging a plantation which he owned in Louisiana, and recovered judgment. A suit upon it was afterwards brought in Maine, where the defendant resided. He pleaded that the property of the plaintiff had been taken to furnish his troops with necessary supplies. The case ultimately came before the Supreme Court of the United States. Here it was thrown out, the court saying that the District Court of New Orleans had no jurisdiction to call military officers to account for acts done under claim of military right.² So far, however, as litigation between private parties unconnected with military operations is concerned, a court of this character, established by law, and suffered by the military authorities to continue its sessions, has competent jurisdiction, and its judgments will be enforced in other States.³ They have no power to entertain criminal charges against

¹The Grapeshot, 9 Wallace's Reports, 129; Report of Am. Historical Association for 1892, 199.

²Dow v. Johnson, 100 U. S. Reports, 158.

³Pepin v. Lachenmeyer, 45 New York Reports, 27.

those in the military service, who would be punishable by court martial.¹

In 1864, during the war, but in Indiana, a State distant from the seat of hostilities, the military commandant of the district ordered the arrest of a private citizen and his trial before a military commission on charges of conspiracy against the United States, as a member of a secret organization known as the Order of American Knights or Sons of Liberty. The trial resulted in his conviction, and a sentence to death, which was approved by the President of the United States. Before it could be executed, he applied to the Circuit Court of the United States for the District of Indiana for a writ of *habeas corpus*. The judges of that court were divided in opinion in regard to the case, but it was decided in his favor when it came before the Supreme Court of the United States.² The decision was unanimous, but in stating the reasons for it the court was divided in a manner which has not been uncommon since the death of Chief Justice Marshall when any great question of a political nature has been involved. Five justices held that the trial of a civilian by a military commission can never be vindicated in a peaceful State where the courts are open and their process unobstructed. Four justices dissented, and Chief Justice Chase thus summarized their conclusions:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the

¹ *Coleman v. Tennessee*, 97 U. S. Reports, 509, 519.

² *Ex parte Milligan*, 4 Wallace's Reports, 2, 121, 127.

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boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress, while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress in such times and in such localities to authorize trials for crimes against the security and safety of the national forces may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.¹

The Constitution of the United States contains some provisions restricting the jurisdiction of military authorities and tribunals over controversies, which are not found in the Constitutions of the States. It may well be that martial law has for the United States a narrower meaning than it may possess in a particular State.

The legislature of Rhode Island in 1842, during

¹ *Ex parte* Milligan, 4 Wallace's Reports, 141.

“Dorr’s Rebellion,” by a Public Act put that State under martial law until further order, or until its termination should be proclaimed by the Governor. A squad of militia broke into the house of a private citizen to arrest him as an abettor of Dorr, and were afterwards sued in trespass before the civil courts. The cause finally came before the Supreme Court of the United States, where (one justice only dissenting) it was held that the Act could not be pronounced an unjustifiable exercise of legislative power under any provision of the federal Constitution.¹ Whether the courts of Rhode Island could have taken a different view, under the fundamental laws of the State, was not decided.²

On the other hand, there are States in which the Constitution explicitly provides that “the military power shall always be held in an exact subordination to the civil authority and be governed by it.”³ It is a serious question whether, under such provisions, a legislative or executive declaration of martial law in time of peace, in order the better to cope with some local disturbance, is to be regarded as an expression of the will of the civil authority, by virtue of which the civil courts lose the power of discharging on *habeas corpus* one restrained of his liberty by military command. That it is such an expression was held in Colorado in 1904, but by a court composed of only three judges, of whom one, in a dissenting opinion, observed

¹ *Luther v. Borden*, 7 Howard’s Reports, 1, 45.

² *Ex parte Milligan*, 4 Wallace’s Reports, 2, 129.

³ Constitution of Massachusetts, Declaration of Rights, Art. 17. Cf. Constitution of Colorado, Art. 2, Sec. 22.

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that the decision of his associates "is so repugnant to my notions of civil liberty, so antagonistic to my ideas of a republican form of government, and so shocking to my sense of propriety and justice that I cannot properly characterize it." A similar question arose, but was not judicially determined, in Arkansas in 1874. There was a contest over the election of Governor. The Constitution provided that such contests should be decided by the joint vote of both houses of the legislature. Baxter, the candidate who was elected on the face of the returns, was declared elected by the President of the Senate and took the oath of office. Brooks, the other candidate, presented a petition for a contest to the lower house, which refused to grant it. He then applied to the Supreme Court on *quo warranto* proceedings, which threw out the case for want of jurisdiction.¹ A similar suit was then brought in a *nisi prius* court, on which judgment was rendered in his favor,² and he was put in possession of the executive chambers by an armed force which he assembled. Baxter then declared martial law in the county in which the capital was situated, and arrested two of the judges of the Supreme Court on their way to attend a special session called to take action in *mandamus* proceedings brought in behalf of Brooks. They were rescued after a day or two by United States troops and proceeded to join their associates. The court then gave judgment for Brooks in his third suit, directing the State Treasurer

¹ State v. Baxter, 28 Arkansas Reports, 129.

² This judgment was reversed on appeal. Baxter v. Brooks, 29 *id.*, 173.

to pay his warrants. At this point the legislature applied to the President of the United States for protection against domestic violence, under Art. IV of the Constitution of the United States, and his compliance by a proclamation officially recognizing Governor Baxter and ordering the Federal troops to support him closed the history of this disgraceful incident.¹

¹ McPherson, "Hand-book of Politics for 1874," 87-100.

CHAPTER XXII

APPOINTMENT, TENURE OF OFFICE AND COMPENSATION OF JUDGES

THE oldest which survives of our American Constitution, that adopted by Massachusetts in 1780, requires the appointment of judges to be made by the Governor of the State, with the advice of the Council, and for good behavior.¹

This plan was substantially followed in framing the Constitution of the United States. That was planned for a small number of States, perhaps only nine, certainly at first not over thirteen. The Senate, therefore, would be a body small enough to serve as an executive council. Its necessary enlargement by the admission of new States has long made it but ill-suited for this purpose, and has thrown the power of confirming or rejecting an executive nomination for judicial office largely under the control of the Senators from the State to which the person named belongs, although this control is much weakened if they do not belong to the party of the administration. The principle that the greater the concentration of the appointing power, the greater will be the sense of individual responsibility for every appointment made,

¹ Constitution of Massachusetts (1780), Chap. I, Art. 9;
Chap. III, Art. 1.

makes this result of a Senate of ninety members not wholly unfortunate. The President now consults a council of two.

Thirteen States in all originally gave to the Governor the power either of appointing or of nominating the judges of the higher courts; fourteen gave their election to the legislature; the rest preferred an election by the people.¹ If we compare the original practice in each State with its present practice, we find that there are now fewer in which the Governor appoints or nominates; fewer in which the legislature elects; more in which the people do. Legislative elections have been found to imply a system of caucus nominations, and have often led to a parcelling out of places among the different counties in which geographical considerations told for more than did fitness for office. In one State² since 1880, the legislature has elected on the Governor's nomination. In practice they have never failed to act favorably upon it.

Mississippi, which, in 1832, became a leader in the movement toward the choice of the judges by popular election, in her latest Constitution (of 1890) follows the plan of the United States, the Governor nominating and the Senate confirming.

The action of the confirming or electing body when unfavorable in any State has generally been unfortunate. It is apt to be affected by local or personal political influence to which the chief executive would be insensible. A large number of able men have thus,

¹ Baldwin, "Modern Political Institutions," 58, 59.

² Conn. Constitution, Twenty-sixth Amendment.

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from time to time, been deprived of a seat on the Supreme Court of the United States who would have added to its luster. In 1867 Massachusetts lost a Chief Justice of the first rank in this way by the defeat of Benjamin F. Thomas. The council refused, by a majority of one, to confirm his nomination because, though of the same party with them, he was of a different wing.¹

In most of the States the judges are now elected by the people.² This makes the choice more a political affair. The nominations are made by party conventions, and generally in connection with others of a purely political character. It also, in case of a nomination for re-election, places a judge on the bench in the disagreeable position of being a candidate for popular favor at the polls and an object of public criticism by the political press.

In 1902 a justice of the Supreme Court of Michigan was nominated for re-election. There was an opposing candidate, some of whose friends published a statement that in the nine years during which the justice had already served he had written opinions in 68 railroad and street railway cases of which 51 were in favor of the companies. He was re-elected, but some time afterwards this fact was reprinted in a local peri-

¹ Proceedings Mass. Historical Society, 2d Series, XIV, 301.

² In thirty-three. In one other (Florida) the people elect the judges of the Supreme Court, and the Governor, with the advice and consent of the Senate, appoints those of the superior courts. The Governor nominates in Delaware, Mississippi and New Jersey, and in the four largest New England States. In Rhode Island and Vermont, South Carolina and Virginia, the legislature elects.

odical accompanied by the remark that "we must conclude that either the railroad and railway companies—4 to 1—had exceptionally good cases from the standpoint of law and justice or his Honor's mind was somewhat warped in their favor. . . . You can't expurge mental prejudice from judicial opinions any more than you can from the reasonings of theologians and atheists. . . . To imagine a justice deciding a case against his personal interests is too great a stretch of imagination for us to appreciate."

A less brutal but more dangerous attack, made in 1903 by a religious newspaper, illustrates the same evil. The Supreme Court of Nebraska has decided that under their Constitution the Bible cannot be used in the public schools. It was, of course, a pure question of the construction of a law, for the policy of which the court had no responsibility. The newspaper in question¹ which, though published in the East, had some circulation in that State, printed this paragraph:

"The Supreme Court judge of Nebraska who wrote the decision that the State constitution prohibits the use of the Bible in the public schools is standing for re-election, and the fact that he made such a decision is not forgotten by the Christian voters."

In States the control of which by one of the great political parties is assured, the real contest is for the nomination, and here there is even more license for unfavorable comment on the judicial record of one who seeks it. In a Southern State there was such a struggle in 1903 for the nomination of the prevailing

¹ The *Boston Congregationalist* of Oct. 3, 1903.

party for Governor. The person who then held that place desired it. So did one of the justices of the Supreme Court. It is said that the friends of the former circulated a cartoon representing the five justices together as five jackasses, and another in which the justice whom they were trying to run off the field was caricatured in the act of setting aside a verdict in favor of a child injured by a railway accident. The two candidates subsequently met upon the platform for a joint discussion of the issues before the people. The Governor sharply criticised the character of the Supreme Court. The judge caught him by the collar and was about to strike him when friends intervened, and an explanation of the remarks was made which was accepted as satisfactory.

In the heat of a political campaign men do not always stop to measure words or weigh questions of propriety. The personal character and public acts of an opponent are a legitimate subject of description and comment. Sharp attacks must be expected as a natural incident of such a contest, and by candidates for judicial office as well as others. The public record of all for whom votes are asked at a public election must be the subject of open criticism, or there would be danger that unworthy men would succeed. To treat such observations as have been quoted upon opinions previously written by a candidate for reelection, however unseemly or unjust, as a contempt of court would be indirectly to impair the right of free suffrage.

If assertions published as to acts done or words said are false, it does not follow that they are libellous.

An honest mistake may be a defense for such a misstatement.¹

Judges of trial courts, when candidates for re-election, may expect the publication of similar attacks on rulings which they have made. The following dispatches, which appeared in the same issue of a local newspaper in Pennsylvania in 1903, when a county election was soon to occur, will sufficiently illustrate this:

**HOT JUDICIAL FIGHT PROMISED FOR MERCER.
COUNTY WILL BE SCENE OF AN INTERESTING
STRUGGLE FOR SEATS IN THE
LEGISLATURE.**

SHARON, Pa., Dec. 25.—From present indications the coming judicial fight in Mercer County will be a bitter one. Public interest centers in the efforts of Judge S. H. Miller and his friends to secure a re-election, and the attempts of his opponents to place A. W. Williams of Sharon on the bench instead. While the sole topic politically is on the judgeship, the twenty or more candidates for Assembly are not losing the opportunity of fixing their fences. They, too, have assumed a reticence in regard to the matter of the judgeship. It is expected that on the last lap of the race Williams and Miller will be the only two men remaining. There are three other candidates for the Republican nomination who have thus far announced themselves. They are: W. J. Whieldon of Mercer; W. W. Moore of Mercer, and L. L. Kuder, burgess of Greenville. Judge Miller and A. W. Williams are the closest of friends.

**JUDGE MILLER ASKS FOR MODERATION. BARS PURE
FOOD PROSECUTIONS BY REFUSING TO
SENTENCE THOSE CONVICTED.**

HARRISBURG, Pa., Dec. 25.—State Dairy and Food Commissioner Warren has been confronted with a new proposition in

¹Briggs v. Garrett, 111 Penn. State Reports, 404; 2 Atlantic Reporter, 513.

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his crusade in Western Pennsylvania against violators of the pure food laws. Judge S. H. Miller of Mercer County, before whom several oleomargarine dealers were recently convicted for the illegal sale of "oleo," has refused to sentence them on the ground that the procedure of the State Pure Food Bureau is persecution and lacking in equity. He takes the position that grocers and saloon keepers, not being expert chemists, should at least be warned previous to arrest, and be given a chance to determine whether the foods they are handling are pure or adulterated. Judge Miller's position is a serious impediment in the way of the enforcement of the law, and Commissioner Warren is preparing to take action that may compel him to punish offenders convicted before him.

Not infrequently in the judicial history of the United States there has been presented to a judge the choice between rendering a decision according to his opinion of the law and the facts and losing his seat, and rendering one according to public opinion, or the public opinion of his party friends, and keeping it.

A judge of the High Court of Errors and Appeals in Mississippi was one of the earlier martyrs in the cause of judicial independence. The State had incurred a heavy bonded debt, which she found it inconvenient to pay. The Governor, who had approved the bills under which over \$15,000,000 of the bonds had been issued, concluded in 1841, after the issue, that it was forbidden by the Constitution of the State, and issued a proclamation declaring them void. In a suit in chancery this question came up for decision in 1852. Meanwhile the policy of "Repudiation" had been made a political issue and the people had given it their approval by electing its advocates year after year to the highest offices. The chancellor upheld the

validity of the bonds, and on appeal his decision was unanimously affirmed.¹ A few months later the term of office of one of the judges who had concurred in this opinion expired, and the people put a successor in his place who held doctrines better suited to the public sentiment of the hour.

In the days preceding the Civil War, the validity of the laws enacted by Congress to secure the recapture of slaves who had fled to the free States was frequently attacked in the press and on the platform. The Constitution expressly provided for such proceedings, and the Supreme Court of the United States in 1842 had pronounced the "Fugitive Slave law" of 1793 to be valid in all respects.² The principle of this decision plainly covered the later Act of 1850, but as public sentiment in the North became more and more uncompromising in its hostility to the existence of slavery under the flag of the United States, the State courts were not always strong enough to withstand the pressure to disregard precedents and let the Constitution give place to what the phrase of the time called a "higher law."

In 1859, a citizen of Ohio was convicted in the District Court of the United States and sentenced to jail for rescuing a fugitive slave who had been recaptured in Ohio by an agent of his master, to whom he had been committed in proceedings under the Act of Congress. He was imprisoned in an Ohio jail, the United States then having none of their own, but placing all

¹ *State v. Johnson*, 25 Mississippi Reports, 625; *Memoir of Sergeant S. Prentiss*, II, 268.

² *Prigg v. Pennsylvania*, 16 Peters' Reports, 539.

their convicts in State jails or prisons under a contract with the State to keep them for a certain price. His counsel applied to the judges of the Supreme Court at chambers for a writ of *habeas corpus* against the Ohio jailer. He produced his prisoner and submitted a copy of the warrant of commitment from the District Court. The public were extremely interested in the outcome of the proceedings. The Attorney-General of the State assisted in presenting the petitioner's case. The Governor was one of the multitude present in the crowded court room. The Attorney-General declared that the position that the Supreme Court of the United States had the power to decide conclusively as to the constitutionality of the laws of the United States and so tie the hands of the State authority was untenable and monstrous. "Georgia," he said, "hung Graves and Tassel over the writ of error of this same Supreme Court. God bless Georgia for that valiant and beneficent example."¹ It was, he continued, "a sectional court composed of sectional men, judging sectional questions upon sectional influences."²

Of the five judges, three held that the constitutionality of the Fugitive Slave law was settled conclusively by repeated decisions of the Supreme Court of the United States, and that the State courts could not release the prisoner. Chief Justice Swan gave the leading opinion. Its positions were thoroughly distasteful to the people of Ohio. He knew they would be. His term, which was one of five years, expired in the following February, and the vacancy was to be filled

¹ *Ex parte* Bushnell, 9 Ohio State Reports, 150.

² *Ibid.*, 161.

at the State election in October. On the day before the judgment was announced he told his wife that this would be fatal to his re-election. "If the law makes it your duty to give such an opinion," said she, "do it, whatever happens." He gave it, and what they anticipated occurred. The convention of his party declined to renominate him. He resigned his office immediately after the election and retired to private life at an age and under circumstances which made it impracticable for him to re-enter the bar with success, but with the consolation of knowing that he had acted right.

Chief Justice Day of Iowa, one of the ablest men who ever sat on her Supreme bench, in the same way lost a re-election by writing an opinion of the court, which announced a doctrine that was legal but unpopular.¹ His term was soon to expire. He, too, knew that this decision would prevent his renomination, and it did.

In 1885, Chief Justice Cooley of Michigan, one of the great jurists and judges of the country, failed to secure a re-election to its Supreme Court, which he had adorned for twenty-one years, largely on account of an opinion which he had written supporting a large verdict against a Detroit newspaper for libel. The newspaper, upon his renomination, described him as a railroad judge, and kept up a running fire through the campaign, which contributed materially to his defeat.

Political contests cost money, and if judges appear as candidates for popular suffrage they are naturally

¹ Koehler v. Hill, 60 Iowa Reports, 543, 603.

expected to contribute to the expense. The other candidates on the same ticket do this, and if those nominated for the bench did not, somebody would have to do it for them, thus bringing them under obligations that might have an unfortunate appearance, if not an unfortunate effect. In New York, where some of the judicial salaries are higher than anywhere else in the country, and the terms for the highest places are long (fourteen years), it has been customary for those placed in nomination to contribute a large sum to the campaign expenses of their party. This is tacitly understood to be a condition of their accepting the nomination, and the amount to be paid is fixed by party practice. For an original nomination by the party in power, it is said to be about equal to a year's salary; for a renomination half that sum may suffice.

But a judge holding office by popular election must in any case owe something to somebody for supporting his candidacy. He is therefore under a natural inclination to use his power, so far as he properly can, in such a way as to show that he has not forgotten what his friends have done for him. There is always a certain amount of judicial patronage to be bestowed. There are clerks and messengers, trustees and receivers, referees and committees, perhaps public prosecuting attorneys and their assistants, to appoint. Other things being equal, no one would blame a judge for naming a political friend for such a position. But as to whether other things are equal he is to decide. To the most upright and fearless man the danger of this is great; to a weak or bad man the feeling of personal obligation will be controlling. Justice Barnard of the

Supreme Court of New York once observed on the bench that judges had considerable patronage to be disposed of at their discretion, and that for his part he had always succeeded in life by helping his friends and not his enemies. For this practice, among other things, he was impeached and removed from office; but how many judges are there who yield to this temptation without avowing it? A French critic of the elective judiciary has thus referred to these remarks of Justice Barnard:

Le Juge Barnard, qui formulait en plein tribunal cette déclaration de principes, fut décrété d'accusation et condamné, non sans justes motifs. Mais son crime impardonnable était de proclamer trop franchement les doctrines de la magistrature électorale: il trahissait le secret professionnel.¹

Most of the old thirteen States in their first Constitutions provided that the judges of their highest courts should hold office during good behavior, or until seventy years of age. New York at first put the age of superannuation at sixty, but after losing by this the services of Chancellor Kent for some of his best and most fruitful years, postponed it to seventy. Georgia was the first to set the fashion of short terms. Her Constitution of 1798 provided that the judges of her highest court should be "elected" for three years, but that those of her inferior courts should be "appointed" by the legislature and hold during good behavior. The legislature construed this as allowing it to frame such a scheme of election as it thought best,

¹ Duc De Noailles, *Cent Ans de République aux Etats-Unis*, II, 232.

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and that adopted was for the House to nominate three, from whom the Senate elected one.¹

In all but three States (Massachusetts, New Hampshire and Rhode Island) at the present time all judges hold for a term of years, and as a general rule those of the higher courts have longer terms than those of the inferior ones. The change from life tenure to that for a term of years was partly due to several instances which occurred early in the nineteenth century, in which it was evident that judges had outlived their usefulness. Judge Pickering of the District Court of New Hampshire lost his reason, and to get rid of him it became necessary to go through the form of impeachment. In 1803, Judge Bradbury of the Supreme Judicial Court of Massachusetts, who had been incapacitated by paralysis, was displaced in the same way, though only a few months before his death. In 1822, an old man who was the chief judge of one of the judicial districts of Maryland was presented by the grand jury as a "serious grievance," on account of his habitual absence from court. His physician certified that his life would be hazarded if he undertook to attend, but the natural answer was that then he should resign.

At present, for judges of the State courts of last resort, the term in Pennsylvania is twenty-one years (but with a prohibition of re-election); in Maryland, fifteen; in New York, fourteen; in California, Delaware, Louisiana, Virginia, and West Virginia, twelve; in Michigan, Missouri, and Wisconsin, ten; in Colorado, Illinois, and Mississippi, nine. The general

¹ Schouler, "Constitutional Studies," 65.

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average is eight, although that particular number obtains in but seven States. In eighteen it is six. The shortest term is two, and is found in Vermont. It may be noted that the original rule in Vermont was to elect judges annually. As compared with the terms of office prescribed at the middle of the nineteenth century, those at the opening of the twentieth are on the average decidedly longer.

The compensation of most American judges is a fixed salary.

In some States, courts of probate and insolvency, and in all justices of the peace when holding court, are paid by such fees as they may receive, at statutory rates, for business done. As in the case of sheriffs and clerks, judges under such a system sometimes receive a much larger official income than any one would venture to propose to give them were they to be paid for their services from the public treasury. A clerk of court often receives more than the judge, and some judges of probate and insolvency more than the Chief Justice of their State.

In colonial times, judges were sometimes paid in part by fees, in part by occasional grants by the legislature, and in part by a regular stipend. This practice of legislative grants from time to time in addition to their salaries was continued in Massachusetts in favor of the justices of the Supreme Judicial Court for a quarter of a century, in the face of a Constitution which provided that they "should have honourable salaries ascertained and established by standing laws."¹

¹ Memoir of Chief Justice Parsons, 228.

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It was evidently indefensible in principle, and to remove judges, as far as possible, from temptation either to court the favor or dread the displeasure of the legislature it is now generally provided in our American Constitutions that their salaries shall be neither increased nor decreased during the term for which they may have been elected by any subsequent change of the law. In a few States it is thought sufficient to guard against the consequences of legislative disfavor, and the Constitutions forbid only such a decrease of salary.

The Chief Justice of the Supreme Court of the United States receives \$13,000 a year and his associates \$12,500. Circuit Judges have \$7,000, and District Judges \$6,000.

In the States, the Chief Judge of the New York Court of Appeals receives \$10,500 and his associates \$10,000. The same salaries are given in Pennsylvania. In New Jersey, the Chancellor and the Chief Justice each receive \$10,000 and the associate judges \$9,000. In Massachusetts, the Chief Justice receives \$8,500 and his associates \$8,000. In the other States less is paid, the average for associate judges in the highest courts being about \$4,350. Only nine States pay over \$5,000. The Chief Justice in many receives \$500 more. These salaries are, however, generally supplemented by a liberal allowance for expenses, and in some States each judge is provided with a clerk. In New York, this addition amounts to \$3,700; in Connecticut, to \$1,500; in Vermont, to \$300.

The salaries for the highest trial court generally closely approximate those paid to the judges of the

Supreme Court, and in case of trial courts held in large cities are often greater. Those for the inferior courts are much lower.

The judges of the principal *nisi prius* court (which is misnamed the Supreme Court) in New York City are allowed by law to accept additional compensation from the county, and receive from that source more than from the State, their total official income being \$17,500. The trial judges in Chicago also receive \$10,000, although the highest appellate judges in the State have a salary of only \$7,000.

It is not surprising that American judicial salaries are no greater, but rather that they are so large. They are fixed by a legislature, the majority of the members of which are men of very moderate income, and when originally fixed in the older States it was often by men not altogether friendly to the judiciary. It was a saying of Aaron Burr, which was not wholly untrue in his day, that "every legislature in their treatment of the judiciary is a damned Jacobin club."¹ Only the influence of the bar has carried through the successive increases which have been everywhere made.

The first pension to a retired judge ever granted in the United States was one of \$300 voted in Kentucky in 1803. It was offered to one of the members of the Court of Appeals to induce him to resign, but the year after his resignation the statute was repealed on the ground that it was unconstitutional.² Since 1869, the United States have allowed their judges who have reached the age of seventy, after not less than ten

¹ "Memoir of Jeremiah Mason," 186.

² Sumner, "Life of Andrew Jackson," 120.

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years' service, to retire, at their option, receiving the full official salary during the remainder of their lives. Rhode Island gives hers the same privilege after twenty-five years' service, and Massachusetts and Maryland have somewhat similar provisions, except that the judges on retirement receive but part of what they formerly did. The Connecticut legislature is in the habit of appointing her judges, both of the Supreme and Superior Court, when retired at the age of seventy, State referees for life, with an allowance of \$2,500 for salary and expenses, their duties being to try such questions of fact as the courts may refer to them and to report their conclusions.

Our State Constitutions now generally provide that judges shall hold no other public office. Some also provide that all votes for any of them for any other than a judicial office shall be void.

Occasionally a judge, in order to eke out his official income, accepts a salaried position, calling for but little of his time, in a matter of private business employment. This, however, is rarely done and there are obvious objections to it when the employer is one likely to have business before the court. Many of the judges of the higher courts, including several of the justices of the Supreme Court of the United States, are professors or lecturers in law schools.

The best mode of appointing judges is that which secures the best men. Such men are unlikely to accept a place on the bench of one of the higher courts, unless it carries with it some prospect of permanence. It does, if it comes to them by way of promotion after

they have served acceptably for a length of time in an inferior court. But most judges must be taken from the bar and, save in very unusual cases, will be in large and active practice. This must be totally abandoned if they take one of the higher judicial positions; and if they take the lowest, must be made secondary to it. A lawyer's practice is more easily lost than gathered. If it is a solid one, it is of slow growth. For one who has turned from the bar to the bench to expect on retirement from office to resume his old practice would be to expect the impossible. He may have achieved a position by his judicial work which will enable him to take a better position at the bar; but in that case his clients will be mainly new ones. He is more likely, particularly if no longer young, to sink into a meagre office practice and feel the pinch of narrow means, always doubly sharp to one who by force of circumstances has a certain social standing to maintain. The leaders at the bar therefore seldom consent to go upon the bench unless they have property enough to ensure their comfortable support after they leave it, without returning to the labors of the bar.

This is one of those evils which carry in some sort their own antidote. The lawyers, as a body, are always anxious for their own sake to have an able and independent bench. They do not wish to trust their causes, when they come before a court of last resort for final disposition, to men of inferior capacity and standing. They therefore can generally be relied on to urge on the nominating or appointing power the selection of competent men. Their influence in this respect is little

short of controlling. If competent men will not ordinarily go on the bench of an appellate court, unless by way of promotion, until they have accumulated a sufficient fortune to make them comfortable in old age, then as competent men will usually, in one way or another, be selected, and as few of these are men who from their youth have been occupying judicial positions, the judges will usually be possessed of some independent means. A property qualification almost is thus imposed by circumstances on those forming the American judiciary in its highest places. The same thing is true of our higher diplomatic positions. As Goethe has said, there is a dignity in gold. It is a poor kind of dignity when unsupported by merit, but if to gold merit be joined, each lends to the other solidity and power.

Among the men of the first eminence at the bar whom the meagerness of the salary has kept off the bench may be mentioned Jeremiah Mason, who declined the position of Chief Justice of New Hampshire on this account, and William Wirt. Wirt in 1802 was made one of the Chancellors of Virginia at the age of twenty-nine. The salary and fees amounted to about five hundred pounds a year. He married on the strength of it, but in a few months found that his income was insufficient to maintain his family, and resigned.¹

Dignity and power, however, are strong attractions. Theophilus Parsons in 1806 left a practice worth \$10,000 a year—the largest in New England in his day—to take the place of Chief Justice of Massachu-

¹“Memoirs of William Wirt,” I, 91, 99.

setts on a salary of \$2,500. After three years he sent in his resignation, saying that he found that this sum was insufficient for his support, even with the addition of the income from such property as he possessed. The legislature thereupon raised the salary to \$3,500, and he remained on the bench through a long life.¹ In 1891, Richard W. Greene of Rhode Island, who then had a practice of \$8,000 a year, gave it up for the Chief Justiceship of the State, though the salary was then but \$750, supplemented by some trifling fees. In a few years, however, he resigned the office on account of the inadequacy of the compensation.²

The qualities of a judge are by no means the qualities of a politician. The faculty of looking at both sides of a question and the power of forming deliberate and well-considered judgments do not tell for much in a campaign speech. The politician's title to support is standing by his friends. The judge's duty may be to decide a cause against his friends. Many a lawyer of eminence might accept a nomination from a President or Governor involving no participation in a political election contest who would refuse one from a party convention.

The general sentiment of thinking men in the United States is that judges should never be chosen by popular vote. It is, however, an unpopular sentiment. The people in general do not appreciate the difference between their fitness to select political rulers and to select judicial rulers—to choose out good men and to

¹ "Memoir of Chief Justice Parsons," 194, 228, 230.

² Payne, "Reminiscences of the Rhode Island Bar," 75.

choose out good lawyers. And the people make and ought to make our Constitutions. Rufus Choate once said that the question at bottom was, Are you afraid to trust the people? If you answer Yes, then they cry out that "he blasphemeth." If you answer No, they naturally reply, Then let them elect their judges.

Jefferson was the first to suggest an elective judiciary, basing his opinion on a misconception of the usage in Connecticut. There, he wrote, the judges had been chosen by the people every six months for nearly two centuries, yet with few changes on the bench, "so powerful is the curb of incessant responsibility."¹ In fact, the Connecticut judges were chosen annually, and those not holding judicial powers as an incident of political ones were appointed by the legislature. The experiment of resorting to popular election was first fully tried in Mississippi in 1832, under the influence of Governor Henry T. Foote, but in later life he expressed his regret at the course which he had taken, and the belief that it had weakened the character of the bench.²

The scheme of popular election may be pursued with reasonable success if the bar use all the influence at their command to secure both good nominations originally and the re-election of all who have served well.³

¹ Works, VII, 9, 12, 13, 35; letter of July 12, 1816, regarding a new Constitution for Virginia.

² "Casket of Reminiscences," 348.

³ It is not uncommon for local bar associations after the party nominations for the bench have been made to refer them to a committee, on the report of which those deemed the best are commended for popular approval. In two judicial districts in Iowa, the lawyers nominate judges for the district in a con-

A conspicuous instance of its success under such conditions is shown by the repeated re-election of Judge Joseph E. Gary of the criminal court of the city of Chicago. Originally elected in 1863, when it was called the Recorder's Court, he has been re-elected for successive terms of six years without a break, and in 1903, when he was 82 years old and still in active service on the bench, received well-merited addresses of congratulation from the Chicago Law Institute and the Chicago Bar Association. Judges of Probate, whose functions are largely of a business character, and who are brought into close contact with the people at first hand, are frequently re-elected for a long period of years with little regard to their party affiliations.¹

In case of those having long terms of office, a re-election comes more easily and commonly. A man who has been ten or twenty years upon the bench has become set apart from the community. The people have ceased to think of him as one of themselves, so far as the active political and business life of the day is concerned. His position and his work, if it has been good, have given him a certain elevation of station. Men have learned to trust him, and to feel that his presence on the court helps to make liberty vention of delegates from the bar, and then see to it that the nominations are ratified by the party conventions. Simon Fleischmann, "The Influence of the Bar in the Selection of Judges," Report of 28th annual meeting of the New York State Bar Association (1905).

¹ In the Probate District of Hartford in Connecticut there have been but two judges during the last forty years, though the elections have been annual or biennial.

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and property more secure. If he receives his party nomination, he is apt to secure a majority of votes, whether the others on the ticket are or are not elected. The opposing party often nominates him also, and sometimes, if his own gives the nomination to another, nominates him itself, and with success.

In New York it has been generally the case that a good judge of the Court of Appeals or Supreme Court is re-elected until he reaches the age limit set by the Constitution. To accomplish this, however, it has been necessary for the bar to use constant efforts to bring the nominating conventions of both parties to the support of the same man or men, and personal ambition and party feeling have on a number of occasions set up an effectual bar. Before a recent election of two judges in that State, in preparation for which a scheme had been suggested by which one of the outgoing judges of each party should be re-elected, a third candidate for the succession, himself a prominent member of the bar and an officer of the State, published a lengthy statement of his claims, which concluded thus:

“I am a candidate for nomination to the office of Associate Judge of the Court of Appeals at the coming Democratic State Convention. I appeal to my fellow-citizens for their support. While I do not believe that support for judicial candidacy should be unduly importuned, I feel that the present circumstances justify me in making this announcement. I have always stood by my party in its dark days, when others voted the Republican ticket in the interest of their business. I

have assisted in endeavors to so shape its policies as to make success possible. Now that this has been accomplished, I do not think that my fellow-Democrats will thrust me aside to make way for those who neither affiliate with the party nor vote its ticket.”

As a general rule, in the country at large political considerations are decisive, both in cases of popular election and of executive nomination, but as to the latter exceptions are more frequent. One instance has occurred in which a President of the United States nominated to the Supreme Court a member of the party in opposition to the administration,¹ and the same President, upon the creation of the Circuit Court of Appeals, when there were a number of new judges to be appointed, gave several of the places to those not of his political faith. It is, however, to be expected that the Presidents of the United States, as a general rule, will place upon the Supreme Court none whose political opinions are not similar to their own. It is a court wielding too great a political power to allow this ground of qualification to be lightly passed over.

Precisely because of this, the political antecedents of the justices of the Supreme Court are more apt to be discoverable in their opinions than is the case in State courts. Professor William G. Sumner, in referring to the change of character of the Supreme Court by reason of Jackson's appointments to it, remarks with some

¹ Howell E. Jackson, a Democrat, was thus appointed by President Harrison, a Republican, in 1893. President Taft, a Republican, has since appointed two Democrats, justices Lurton and Lamar, and made a third Chief Justice.

truth that "the effect of political appointments to the bench is always traceable after two or three years in the reports, which come to read like a collection of old stump speeches."¹

In States where the judges are only appointed for a certain term of years, it is not unusual for the Governor, if he has the power of nomination, to exercise it in favor of outgoing judges who are his political opponents. So, also, if there happen to be several original vacancies to fill, it is the traditional method in a few States to give one of the places to a member of the opposition party. If the election belongs to the legislature, a similar practice prevails in some of the older States. In Connecticut but six instances of refusing a re-election to judges of the higher courts for mere party reasons have occurred for more than a hundred years.² In Vermont, where elections to the Supreme Court were annual, Judge Redfield was placed on the Supreme bench and then re-elected year after year for twenty-three successive years by legislatures controlled by the party politically opposed to him.³

In a few States it is not customary for his party

¹ "Life of Andrew Jackson," 363.

² Judges Baldwin, Goddard, Gould and Trumbull were dropped in 1818 and 1819 as an incident of the political revolution which destroyed the Federalist party in Connecticut and brought about the adoption of a Constitution, under which the judges were to hold for life, to replace the royal charter. Judges Seymour and Waldo were dropped in 1863 during the Civil War, because they were classed with the "Peace Democrats." Their successors, however, were appointed from the "War Democrats," though the legislature was Republican.

³ Edward J. Phelps, "Orations and Essays," 220.

to renominate a judge more than once. Two terms are considered enough for one man, and when he has served them he should make room for some one else. Many a judge has thus been taken from the bench at a time when, with the aid of experience, he was doing his best work.

Appointments to appellate courts are generally provided for by a scheme calculated to prevent any sudden and general changes of membership. Not more than one or two receive an appointment in any one year, so that the terms of not more than one or two can expire at the same time. Where judges hold for life or—as is frequently the case—if there is a constitutional provision that no judge shall hold office after reaching the age of seventy, the vacancies will, of course, occur and be filled at irregular intervals. All this, in connection with the natural tendency to reappoint judges who have earned the public confidence, secures to the court a certain continuity of existence and consistency of view. In every court of last resort in the older States there will be apt to be found some who have served ten or twenty years and were at first associated with those who had themselves then served as long. It is not easy to “pack” a court thus constituted. If, however, some question of supreme political importance is looming up, likely soon to become the subject of litigation, the nominating or appointing power is not likely to be insensible of the party advantages that may result from its decision in a particular way by the highest judicial authority, nor of the importance of the vote to be cast by each who may share in its administration.

During the Civil War Congress passed a conscription law. The Supreme Court of Pennsylvania pronounced it unconstitutional, and advised the issue of a temporary injunction to prevent its enforcement by the officials charged with that function. The term of the Chief Justice was about to expire. The decision had been made by three judges, of whom he was one, against two who dissented. The political party to which he belonged renominated him, but he was defeated at the polls. A motion was soon afterwards made to dissolve the injunction. His successor joined with the former minority in advising that the motion be granted, and on the ground that the Act of Congress was not unconstitutional. The two remaining members of the court adhered to their former opinion.¹

In some States the justices of the Supreme Court select one of their number annually to be Chief Justice for the year ensuing. In several, whenever there is a vacancy, the office falls, as of course, to the justice who has the shortest time to serve. This is a ready way to pass a title about and attach it to as many men as possible in quick succession. Its ostensible defense is that there can be no unfair discrimination and favoritism in such an appointment, and that as the judge whose term has most nearly elapsed will naturally be the one who has served the longest, he will certainly have the advantages of experience. These considerations deserve little weight in view of the sacrifices that such a scheme entails. Unfair discrim-

¹ *Kneedler v. Lane*, 45 Penn. State Reports, 238. See this case reviewed in Pomeroy, "Introduction to the Constitutional Law of the United States," Sec. 479.

ination is indeed prevented, but so is a just and proper discrimination. The plan of promoting the senior associate justice when a vacancy occurs is liable to similar objections, though in less degree. He is at least not unlikely to serve for a considerable time.

To be a good Chief Justice requires special gifts. Whoever holds that office should have not only learning and ability, but patience and courtesy in a high degree. He must be methodical in the transaction of business, if the docket of the court is a large one. He should have the art of presiding over its public sessions and disposing of the minor motions which may be made from the bar with dignity and tact. He should be a man who commonly carries his associates with him at its private consultations in support of any doctrine which he is firmly convinced to be the law applicable to the case in hand. He should have the faculty of conciliation. He should know when to yield as well as to insist, in order to secure the best results for his court and for his State. He should be able to write a clear and forcible opinion. The best lawyer in the jurisdiction who may be supposed to have these qualities and will accept the position ought to be at the head of its judiciary. Many have been tempted from the bar by an offer of that place who would have refused the appointment of associate justice. John Marshall was one of these. Chief Justice Parsons of Massachusetts was another. In the Supreme Court of the United States no Chief Justice has ever been appointed from among the associate justices, although a nomination was offered to and declined by Mr. Justice Cushing in 1796. In

the State courts the general practice is to the contrary, and it is common to fill a vacancy by appointing one of the associate justices.

Popular election and life tenure cannot well go together. The chance of an irremediable mistake is too great. Judicial nominations are often the mere incident of the prevalence in a party convention of one faction of the delegates, whose main object is to control the nominations for other positions. American experience seems to indicate life tenure and executive nomination, with some suitable provision for securing retirement at a certain age, as likely to secure the best judges of the higher courts. This has worked well for the United States, and no State courts have stood higher in the general opinion of the bar than those thus organized. For the lower courts there is less necessity and less chance for getting men of the first rank in attainments and character. Shorter terms of office can therefore reasonably be prescribed, and the objections to popular election are correspondingly less. Even as to them, however, the plan of executive nomination is safer than that of party nomination. A man acts carefully when he is the only one whom the public can hold responsible for what is done.

It is customary to provide that vacancies in judicial offices can be temporarily filled by the Executive until there is an opportunity for a new appointment or election by the proper authority.

The place of a judge who is absent or disqualified is in some States, by authority of a statute or agreement of the parties, occasionally taken by a member of

the bar called in to try a particular cause or hold a particular term of court.¹ So the English assize judges are constituted by special commissions for each circuit, which include also the barristers on the circuit who are sergeants at law, king's counsel, or holders of patents of precedence.

It is hard to dislodge a judge for misconduct or inefficiency. Our Constitutions give remedies by impeachment or by removal by the Governor on address of the legislature, but lengthy proceedings are generally necessary to obtain the benefit of them, and the decision is often in favor of the judge. Party feeling is apt to have its influence in such matters. Whether it does or does not, it is an unpleasant task to assume the initiative. Those who best know the facts are the lawyers, and if some of them are the ones to move, it is at the risk, should they fail, of having afterwards to conduct causes in a court presided over by one who is not likely to regard them with a friendly eye.

The number of judicial impeachments in the history of the country has been comparatively small, and few of these have resulted in convictions.² Of the cases which were successful, the most noteworthy is that of Justice George G. Barnard of the Supreme Court of New York, who was convicted of having abused his right to issue *ex parte* orders and of other measures of improper favoritism. The Bar Association of the City of New York brought the charges, and were influential in carrying the whole proceeding through to a

¹ See Alabama Code of 1896, Sec. 3838; Reporter's note to *Kellogg v. Brown*, 32 Connecticut Reports, 112.

² See Chap. III.

favorable result. In another instance, occurring in 1854 in Massachusetts, the right of impeachment was stretched to its limit by removing a Judge of Probate, Edward G. Loring, the only real ground being that as a United States Commissioner he had ordered the return of a fugitive slave under the laws of the United States—laws the constitutionality of which the highest court of the State had recently declared to be fully settled.¹

Judges of inferior courts are sometimes removable by the higher ones for cause, on complaint of a public prosecutor. In such case, the proceeding being strictly a judicial one, there is more assurance of success if the charges are well founded. Here also, however, it will be known from whom they come, and the hearings are likely to be so protracted and expensive to the State that only a flagrant case will usually be taken up. The hearings on such a complaint, brought in New York in 1903, extended over thirty-six days; the stenographic minutes of the testimony covered over 3,300 pages; there were over four hundred exhibits introduced; and the items of cost presented for taxation amounted to over \$20,000.

Removals by the Governor on the address of the legislature have been more frequent, and occasionally have been dictated largely by party managers who desired to make places for those of their own political faith.² In one instance it was attempted, but unsuccessfully, in Kentucky as a punishment for giving a judicial opinion that a stay-law recently passed by the

¹ Sims' Case, 7 Cushing's Reports, 285.

² Schouler, "Constitutional Studies," 288, note.

legislature was unconstitutional. A two-thirds vote of each house was required, and as in the lower house, though it voted for an address by a large majority, this could not be obtained, the proceeding was allowed to drop.¹ In all there have been in the whole country since 1776 not over thirty removals, whether on impeachment and conviction or on address of the two houses, of judges of a higher grade than justices of the peace.²

Wholesale removals have also, in rare instances, been effected for similar purposes by abolishing courts, the judges of which held during good behavior.³ Maryland was the first to do this, abolishing a court and re-establishing it at the same session, almost in the words of the former law. Congress followed in 1802 by repealing the statute of the year before by which a new scheme of Circuit Courts was arranged and under which sixteen Federalists had been appointed to the bench. Massachusetts did the same thing in 1811 with respect to her Courts of Common Pleas.⁴

The occurrence of vacancies has sometimes been prevented in a similar manner when the nominating or appointing authority was politically opposed to the legislature. The existence of a supreme court is required by all our Constitutions, but the number of the judges is frequently left to be fixed from time to time by statute. The Federalists, when they were

¹ Niles' Register, XXII, 266. See *ante* p. 114.

² See Foster, "Commentaries on the Constitution of the United States," Appendix, 633.

³ See Chap. VII.

⁴ See Chap. VIII.

about to go out of power, provided that the Supreme Court of the United States should on the next vacancy be reduced from six to five, thus seeking to prevent Jefferson from filling such vacancy. By 1863 the number had been raised to ten, but three years later, when a Democratic President was contending with a Republican Congress, it was enacted that as vacancies might occur it should be reduced to seven. In 1869, when a Republican President had come in, the number was restored to nine, and the new justice for whom a place was thus made shortly joined in reversing a decision made by the court not long before and quite unsatisfactory to the majority in Congress on an important constitutional point. Similar legislation, for like reasons, has been had in many of the States.

CHAPTER XXIII

THE CHARACTER OF THE BAR AND ITS RELATIONS TO THE BENCH

EVERY lawyer is an officer of the court as fully as is the judge or the clerk. He has, indeed, a longer term of office than is generally accorded to them, for he holds his position for life, or during good behavior.

Courts could not exist under the American system without lawyers to stand between litigants and the judge or jury. It is a system that requires written pleadings, originally very artificial in form and still somewhat so. It imposes many limitations on the introduction of evidence, which often seem to shut out what ought to be admitted, and rest on reasons not apparent to any who have not been specially instructed in legal history. It divides the decision of a cause between judge and jury in a manner only to be understood after a long and close study. It gives a defeated party a right of review dependent on a number of technical rules, and to be availed of only by those who are skilled in the preparation of law papers of a peculiar kind.

A class of men has therefore been set apart to keep the people from direct approach to the bench, except when they may desire to argue their own cases, which rarely occurs.

In England there are two such barriers, the class of

barristers and the class of attorneys. The attorneys keep the people from access to the barristers; the barristers keep the attorneys from access to the court. The attorney prepares the case, represents his client in the proceedings preliminary to the trial, and assists the barrister whom he may retain at the trial, but cannot examine a witness or argue the cause.

In America we do not thus divide lawyers into two classes. There are many of them who never in fact address the court, but it is not because they have not a legal right to do so. Every member of the bar of any court has all the legal rights of any other member of it.

The qualifications for admission to the bar are generally left to be regulated by the courts. In a few States they are fixed by constitutional or statutory provisions. In all, when the Constitutions do not regulate it, the legislature can. It has indeed been asserted that the admission of attorneys is in its nature a matter for the courts only.¹ English history does not support this contention.² The Inns of Court, which are mere voluntary associations of lawyers, have from time immemorial exercised the function of calling to the bar, so far as barristers are concerned, and the admission of attorneys has always been regulated by Acts of Parliament.³ By our American legislatures the same course has been generally pursued.

The duty of ascertaining whether candidates for

¹ See *American Law School Review*, I, 211.

² Pollock & Maitland, "History of English Law," I, 211-217; II, 226. O'Brien's Petition, 79 Connecticut Reports, 46; 63 Atlantic Reporter, 777.

³ See *In the Matter of Cooper*, 22 N. Y. Reports, 67, 90.

admission have the prescribed qualifications is occasionally performed by the judges in person; more often by a committee of the bar appointed by the court for that purpose; in some States by a standing board of State examiners, receiving compensation for their services.¹ The latter method was introduced in the latter part of the nineteenth century and is steadily gaining in favor. A committee of a local bar is unavoidably subject to some local influences or prepossessions. A State board can act with greater independence and maintain with more ease a high standard of admission.

In early colonial days the legislature sometimes set a limit to the number of attorneys who could be allowed to practice before the courts. In some colonies the number at the bar of a particular court was fixed; in others the number of lawyers in each county.² No such limitation now exists in any State, and the matter is left to be regulated by the law of supply and demand. This by the census of 1900 required over 114,000.

The freer a country is, and the quicker its step in the march of civilization, the more lawyers it will naturally have. The growth and importance of the bar are stunted wherever it is overshadowed by an hereditary aristocracy. A land of absolutism and stagnation has no use for lawyers. The institutions of China would not be safe if she had a bar. Lawyers are a conservative force in a free country; an upheaving

¹ This comes from fees paid by those examined.

² Acts and Laws of the Colony of Conn., May session, 1730, Chap. LIV. Hunt, "Life of Edward Livingston," 48.

force under a despotic government. In Russia one is found enough to serve over thirty thousand; in the United States there is about one to every six hundred and sixty of the population,¹ and in England one to every eleven hundred.

The colonial lawyers of the seventeenth and eighteenth centuries occupied an inferior place in the community as compared with that now held by the legal profession. There was comparatively little opportunity to rise to eminence. The positions on the bench, as has been seen, were largely held by those not trained as lawyers. Before such judges it was a waste of words to make elaborate arguments on points of law.

Among the first settlers were a few who had been educated for the English bar. One of them, in Massachusetts, Rev. Nathaniel Ward, drafted the *Magna Charta* or "Body of Liberties" of that colony, adopted in 1641. His opinion of the need of lawyers may be inferred from the fact that it provided expressly that those who pleaded causes for others should receive no compensation for it. Virginia adopted the same policy from 1645 to 1662. Later, lawyers practicing in Massachusetts were excluded from the General Court. As that had large judicial powers, it was thought fitting to give no opportunity to any to sit there to-day to judge and to appear to-morrow before an inferior court to argue as an advocate.²

As time went on, an American was occasionally sent to London to read law. He was apt to be a young man of fortune, who entered the Temple or the Inns of

¹ In 1870, there was one to every 946; in 1880, one to every 782.

² Hutchinson, "History of Massachusetts," III, 104.

Court more as a means of gaining pleasant acquaintances than for any serious purpose of education. Most of them came from Pennsylvania and the Southern colonies. Two Presidents of the Continental Congress, Randolph and McKean, four signers of the Declaration of Independence, Heyward, Lynch, Middleton, Edward Rutledge, and John Rutledge, one of the first associate justices of the Supreme Court of the United States, were of the number.

Not infrequently there were legal proceedings in London which concerned colonial interests. Their charters were attacked or colony laws and judgments put in question before the Lords of Trade and Plantations. In such proceedings, if counsel were needed, English barristers were generally employed. An American lawyer now and then went over to consult with them and perhaps to join in the argument, but the leading part was theirs.

It was not until the quickening and deepening of American life which preceded and portended the Revolution that anything like a colonial bar, led by a man of learning and position, really came into existence.¹ From the middle of the eighteenth century to its close there was a steady and rapid progress in this direction. Legal education was taken seriously. In the case of many it began with the fundamental notions of justice and right. The Greek and Latin classics on those heads were read.² The private law of the Romans was studied to a greater extent relatively than it is now. The first chair of law in the United States was estab-

¹ "Two Centuries' Growth of American Law," 16.

² "Life of Peter Van Schaick," 9.

lished at William and Mary College in 1779, and there, under Chancellor Wythe, John Marshall was a student. President Stiles of Yale, in his "Literary Diary," so full of that kind of historical incident which after a few years have passed it is most difficult to trace, enumerates the books read by his son, Ezra Stiles, Jr., between 1778 and 1781, in preparation for the Connecticut bar, under the advice and in the offices of Judge Parker of Portsmouth and Charles Chauncey of New Haven. They comprehended, besides much in English and Scotch law, Burlamaqui's *Principes de Droit Naturel*, Montesquieu, *de l'Esprit des Loix*, the Institutes of Justinian, certain titles of the Pandects, and Puffendorf *de Officio Hominis et Civis juxta Legem Naturalem*. James Kent at about the same time was reading Grotius and Puffendorf in the office of the Attorney-General of New York, and Edward Livingston, under Chancellor Lansing, explored all parts of the *Corpus Juris Civilis*.¹ John Quincy Adams a few years later, under the instruction of Chief Justice Parsons of Massachusetts, took up Vattel and the Institutes of Justinian.² The latter, as well as Van Muyden's *Compendiosa Tractatio* of them, his father had studied in his preparation for the bar thirty years before.³

The lectures of Chancellor Wythe at William and Mary, like those of Mr. Justice Wilson in 1790 at the University of Pennsylvania and of Chancellor Kent in 1794 at Columbia, were designed, as were Black-

¹ Hunt, "Life of Edward Livingston," 41.

² Report of the American Bar Association for 1903, 675, note.

³ "Life and Works of John Adams," I, 46.

stone's at Oxford, to give such information as to the nature and principles of law as might be of service to any one desirous of acquiring a liberal education. Such instruction could not be considered as anything approaching a proper preparation for entering on the practice of the legal profession.

The United States preceded England in the endeavor to provide such a preparation by a systematic course of study pursued under competent teachers at a seat of learning established for that sole purpose.

The need of something of the kind was felt to be pressing after the independence of the United States had been fully established. An unusual number of young men of promise were turning from the army to the bar.¹ Those already members of it had educated themselves as best they could, with slight assistance from the lawyers in whose offices they had studied. They in turn were indisposed to do more for such as might desire to read law in their offices. Few of them were competent to do much.²

There was a demand for a professed school of law, and in 1784 the first in any English-speaking country was opened at Litchfield, Connecticut. There are now 104 of them,³ with a total attendance of over fourteen thousand students. The course of study in a few may be completed in one year; in most two are re-

¹ "Memoirs of James Kent," 31. In 1788, the number of attorneys in the State of New York had risen to 120. Morse's "American Geography," ed. 1796, 506. Thirty years later it was 1,200. Niles' "Register," XIV, 311.

² See "Life of Peter Van Schaick," 9, 13.

³ Report of the American Bar Association for 1903, p. 398.

quired; in the rest three, with perhaps an offer of a fourth for advanced instruction leading to the degree of master or doctor of laws. The ordinary degree is that of bachelor of laws (LL.B.).

The American Bar Association has had an important influence from its first organization, in 1877, in prolonging the period and raising the standards of legal education. In affiliation with it there is an "Association of American Law Schools," representing a large majority of the teachers and students engaged in law school work. This admits no institution into its ranks at which students are received without a preliminary education at least equal to that given by the ordinary high school. A few of the schools so associated receive no student, save in exceptional cases, unless he already holds a degree in arts, science, philosophy, or letters from some collegiate institution.

In several of the States having boards of State examiners no one is admitted to the final examination before them who did not prior to the beginning of his education receive one of the degrees above indicated or else pass a special examination before the same board on certain prescribed studies, corresponding substantially with those ordinarily pursued in a high school.

Some proof is everywhere required that an applicant for admission to the bar possesses a good moral character. It is necessarily largely a matter of form. Certificates are sometimes required from those familiar with his previous life, and sometimes the mere motion for his admission by a member of the bar representing the examining committee is accepted as sufficiently

implying that no unworthy person would be thus presented.

In a few States a distinction is made between attorneys with reference to the courts in which they may practice. When first admitted it is to the bar of the trial courts. Later, after a few years of experience, they can be admitted on further examination to practice also in the highest courts of the State.

This distinction reaches back, in New Jersey, to the colonial era. Attorneys were there a different class from "counsellors," and, following the English practice, the style of "sergeant" was also formerly bestowed on leaders at the bar. The last lawyer bearing the title survived until nearly the middle of the nineteenth century. In this State the Governor has always issued the licenses or commissions to attorneys and solicitors in chancery, but for more than a hundred and fifty years only on the recommendation of the Supreme Court.¹

The admission of attorneys in the several courts of the United States is determined by rules which they respectively establish from time to time. These rules make the only qualification membership in regular standing for a certain period of time in the bar of a State and good moral character.

There is no doubt that the United States have been in advance of England both in providing means of legal education and in requiring their use. The length of the course of study now established at our older Law Schools—three years—seems all that can reasonably be exacted, if a proper foundation of general

¹ *In re Branch*, 70 N. J. Law Reports; 57 Atlantic Reporter, 431.

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discipline and knowledge has been previously laid. The first provision for one or more years of graduate study for those who may desire it was made at Yale University in 1876, and a similar opportunity has since been offered at several others; but it has been availed of by few, and of these a considerable part had in view the teaching of law as their ultimate vocation rather than its practice.

Unquestionably the American bar is now, as a whole, a far better trained class of men than it was twenty or thirty years ago, and the efficiency of the courts has been correspondingly increased.

Members of the bar are always subject to punishment by the court for official misconduct. This may be by censure, temporary suspension from practice, or disbarment. If guilty of contempt of court, they can also be sentenced to fine or imprisonment.¹ As suspension or disbarment means a loss, temporary or permanent, of a livelihood, it is only ordered in aggravated cases and after an opportunity for a formal hearing.

Disbarment cannot be decreed by the legislative department. That would be virtually an act of attainder. It must come from a judicial sentence.²

In some States the principal trial court, which is the one by order of which attorneys generally are admitted to the bar, appoints a standing committee on grievances. In others such committees are created by

¹ See Chap. xx.

² *Ex parte* Garland, 4 Wallace's Reports, 333, 378.

Bar Associations, of which almost every State has one for the whole State, while several have also one or more local associations. It is the duty of such a committee to inquire into any instances of professional misconduct that may be brought to their notice and either institute proceedings for a hearing before themselves or bring the matter to the attention of the court, so that they may be instituted there by its order and conducted by the public prosecutor. In the larger States, several inquiries of this nature are ordinarily set on foot every year, which result in suspension or disbarment. In the smaller States they are rare, both because they have smaller bars and because the smaller a bar is the more difficult is it for any one of its number to hide any misdoing from the rest.

The Bar Associations, which first began to start up soon after the Civil War, have been of great service in upholding the honor of the profession. Their Constitutions generally name this particularly as among their professed objects. One State¹ has recently under such influences, passed a statute making it a misdemeanor for an attorney to send out "runners" to solicit practice, and requiring the public prosecuting officer to institute proceedings for any violation of the law, upon the complaint of the council of the State Bar Association.

The steadily and rapidly increasing proportion of lawyers to the population in the United States necessarily tends to a lowering of their average professional income, and this tendency is not fully overcome by the increase of the wealth and business of the country.

¹ Alabama.

The principle of the concentration of industry also works against the great majority of them. Searching titles to real estate, for instance, was until the last half of the nineteenth century part of the business of every lawyer. It is now in the larger cities monopolized by certain firms or corporations, who own copies or abstracts of the public records, laboriously prepared, which give them special facilities for doing the work rapidly and well. So collecting uncontested debts was formerly the staple of many a lawyer's practice. The general abolition of imprisonment for debt about the middle of the nineteenth century rendered the process much more difficult and the fees less, and of late years great collection agencies, generally corporations, have sprung up, with an extensive system of correspondents among members of the bar, by whom most suits of such a nature are now brought under an agreement to divide their fees with the central bureau.

Until the last half of the nineteenth century there were probably no lawyers in this country whose average net income from year to year was equal to that of the leaders of the English bar. In 1806 there was but one lawyer in New England with an annual professional income of \$10,000: until about 1860 there was none in Connecticut, and probably not over a hundred in the entire country.¹ In 1827, William Wirt was informed by Justice Thompson of the Supreme Court of the United States that "six, eight, and ten thousand dollars is considered great practice in New York and ten

¹ Parton, "Life of Aaron Burr." 153; Great American Lawyers, III, 55.

thousand dollars the *maximum*.”¹ Thirty years later the same was true, except that twenty thousand dollars had then become the highest annual average, and that but of a very few.² Daniel Webster earned from \$12,000 to \$20,000 when at the height of his career.³

The Civil War was the occasion of many important business enterprises, and gave rise to much litigation. It brought also a great increase of wealth to the North and West, and new and greater investments of Northern capital in the South. From that time the business of the leading lawyers in every State became more remunerative. Incomes of \$20,000 and \$25,000 were occasionally earned in the smaller States, and of four or five times as much in the larger ones.

The American lawyer of the eighteenth century was apt to have his office in his house. During the nineteenth century this became less and less common and is now comparatively rare. In cities certain streets, generally near the court-house, are crowded with lawyers' offices. These are generally over business stores, but in some places residential streets have been converted to this use, and what was formerly a handsome mansion will have the chambers of counsel on every floor.

In many of the counties in Virginia chambers for the accommodation of the lawyers are built in the rear of the court-house on public ground. A small rent is paid by the occupants to the county. When court is

¹ Kennedy, "Memoirs of William Wirt," II, 209.

² Parton, "Life of Aaron Burr," 153.

³ Harvey, "Reminiscences of Daniel Webster," 84.

about to open each day the crier calls out from one of the court-house windows the name of each lawyer to notify him of the fact.

The relations of the bar to the bench assume a peculiar character under the conditions of American society. The judges stand closer to the lawyers in this country than in any other. All of them, unlike those of continental Europe, have been themselves practicing lawyers. The majority, unlike those of England, are young men, sitting in minor courts, who have generally left the bar for but a brief period, expecting, if not desiring, soon to return to it. Not a few hold court but one or two days in the week or one or two hours in the day, and for the rest of the time are actively engaged in professional practice before other courts. Those of the latter description always occupy a somewhat unfortunate position. The State does not expect them to devote themselves entirely to its service. It does not provide for their compensation on that basis. It expects them to continue the general practice of their profession, except so far as their judicial duties may necessarily prevent. They certainly cannot practice in their own court with propriety. Statutes to prevent it are not uncommon. For the same man to charge the jury one day as judge and address them the next in argument as counsel must tend to confuse their notions as to the weight they should give to what he says, and to lend it often a weight which it may not deserve. So, too, his relations to the clerk and other court officers are such officially as to give him opportunities for influencing them when

he is engaged at the bar, not shared by his brother lawyers.¹

There are, however, in every State quite a number of judges of higher courts who receive a salary deemed sufficient for their support and who are expected to devote their entire time to judicial duties. As respects those of the United States courts there is a statute (U. S. Revised Statutes, Sec. 713) making it criminal for them to practice law. Similar legislation exists in some of the States with regard to the judges of their higher courts, but without it a sense of propriety dictates their abstaining from it, and it has even been held that the right of any judge of a superior trial court of general jurisdiction over important causes to act as an attorney or counsellor, except in his own cause, is suspended by implication of law so long as he retains his seat on the bench.²

The demeanor of the judges to the bar is inevitably affected to some extent by their tenure of office. If they hold their places for life, they naturally are less sedulous to avoid giving offense and less ready to tolerate a poor or tedious argument. A greater distance is maintained for this cause between bench and bar in the federal courts than is usual in most of the State courts.

No judge, however, desires to have the reputation of being overbearing, rough or impatient, and few are. Chief Justice Parsons of Massachusetts at one time fell

¹ French v. Waterbury, 72 Conn. Reports, 435; 44 Atlantic Reporter, 740.

² Perry v. Bush, 45 Florida Reports; 35 Southern Reporter, 225.

into an inveterate habit on the circuit of checking counsel in argument rather curtly when they seemed to him to wander from the vital point. The leaders of the bar of Boston finally determined to stop it, and arranged at the next term at which he was to preside that whoever of them was thus treated should leave the court room. The first to address the court was checked in the usual manner, and observing that he regretted his argument seemed not worthy of the court's attention, took his papers and went out. The next met the same kind of interruption in the same way, and so on until the court room was cleared. The Chief Justice afterwards sought an explanation, received it in good part, and was forever cured of what had been a serious impediment to his usefulness on the bench.¹ Occasionally a trial judge will have a similar lesson taught him by finding no business to be disposed of when he opens court, and learning later that the bar agreed to the continuance of all pending cases, because they did not care to trust him with them, or were disinclined to submit to his manner of conducting a hearing.

Judges are universally desirous of securing the good opinion of the bar as respects their knowledge of law and powers of discrimination and analysis. The bar is their little world. It is a critical world, for in every case that is tried there will be one lawyer who is dissatisfied with the result, and likely to think the judge wrong rather than himself, if every proposition of law which he has asserted has not been conceded.

It is much more common for American judges to be too tolerant of a waste of time by counsel than to be too

¹ See George F. Hoar, *Autobiography*, II, 397.

impatient at it.¹ They dislike even to seem harsh. Most of them also hold office only for a term of years and do not forget that undue severity may jeopardize their re-election. This is one reason for the fact that at all points the bar are subject to fewer restrictions upon their conduct in the trial of causes in American courts than in those of most other countries. Another, and a more fundamental one, is that the judges and lawyers stand more nearly on the same level both in public regard and official position. The lawyer holds a more permanent office in the court than the judge. He is quite likely to be his superior in learning and ability. He belongs to a class that is influential in the community, and whose members usually share quite actively in the direction of party politics. The judge in most instances holds but a brief authority. He does not wish to parade it in such a manner as might seem offensive. He is in danger of seeming to parade it if he goes beyond what is necessary in regulating the conduct of the lawyers who may appear before him. The judge who keeps a rigid watch on the examination of witnesses to exclude all improper testimony, whether objection be made to it or not, declines to hear argument on matters that may appear to him too clear to justify it, and is impatient when argument on doubtful points is continued longer than he thinks worth while, may be respected, but he will never be popular.

Trials for these reasons are longer in the United States than in England. Fewer summary rulings are

¹ See a striking instance of this tendency given in Cleveland, Painesville & Eastern R. R. Co. v. Pritschau, 69 Ohio State Reports, 438; 69 Eastern Reporter, 663.

made. More questionable evidence is admitted. More time is allowed to counsel in the argument of the cause, and more freedom in arguing points that may seem immaterial to the court.

The broad liberty of appeal generally allowed is another reason for hesitation on the part of trial judges to interfere more than seems absolutely necessary with the management of a cause by counsel. It is not merely the legal right of appeal but the practice under it which is a peculiar feature of our judicial system. A foreign lawyer often hesitates to cross swords with the judge. He distrusts his own judgment if it differs from that of the court. He defers to the opinion of the bench, not only as stating the law of the case, but as probably stating the law of the land. He therefore seldom appeals on minor points of procedure, even if he could. In the United States probably one case in ten of all that go to trial is carried up for review on points of law; many of them mere matters of practice not affecting the merits of the cause.

The American lawyer can also safely speak with freedom of the conduct of the government or of high officials should it come in question.

Those in any court, high or low, who hope for a re-appointment know that the best way to obtain it is to secure the good will of the bar. The reputation of a judge depends on the opinion which the lawyers have of him. The general public may be deceived as to his character, ability and attainments; the bar cannot be.

In the public sessions of court there are few judges who are not impressed with the necessity of maintain-

ing the dignity of their position as representing the power of the State. The lawyers recognize this feeling as just. It is common for them to rise as a body when the judge enters the bench. They find no difficulty in using the conventional style of address of "May it please the Court," or "May it please your Honor." When a ruling is made in the course of a trial the lawyer, whose client is adversely affected by it, accepts it without further discussion, simply reserving his exception, if he have one, for purposes of review in a higher court. If, in addressing the jury, counsel exceed the bounds of professional license in commenting on testimony or alluding to the character of the parties, the court will check them without hesitation.

Less outward respect was shown toward the courts by the bar in former times than now, and it often received less courtesy of treatment from the bench. An incident occurring in Massachusetts about the beginning of the nineteenth century may serve as an illustration. Robert Treat Paine, a signer of the Declaration of Independence, resigned his seat on the bench of the Supreme Judicial Court in 1804, at the age of seventy, largely on account of deafness. Naturally somewhat imperious in temperament, his bearing toward the bar had seemed harsher from this infirmity. Fisher Ames used to refer to him as *Ursa Major*, and once told a friend that he should not go into court again, when Judge Paine held it, without a club in one hand and a speaking trumpet in the other. Theophilus Parsons, not long afterwards made Chief Justice of the State, was arguing before him one day when the judge, under the misconception into which a deaf old

person so easily falls, that the younger generation all speak hurriedly and indistinctly, cried out, "Mr. Parsons, I tell you once for all, take that glove off your tongue." "Certainly, Sir," was the quick retort, "and may I beg your honor to take the wool out of your ears?"¹

Some twenty years later Roger Minott Sherman, the leader of the Connecticut bar, in trying a cause before an empty-headed judge who had been put on the bench for no other apparent reason than that his father was a man of distinction, quoted several English authorities and was about to read from another when the judge remarked that he need not take the trouble to read anything more of that sort to him. "Then," said Mr. Sherman, "with your Honor's permission I will read from it to the jury, and let me say that it is an opinion of Lord Ellenborough, a Chief Justice of England who rose to the bench by his own merits, and shone by no reflected light."

One of the anecdotes of the Boston bar is that while Samuel Dexter, one of the great lawyers of his day, was arguing a cause in the Circuit Court of the United States before Justice Story, soon after his accession to the bench, the court suddenly interposed, as a certain principle was asserted, with "That proposition is not law, Sir," to which Mr. Dexter retorted, "It is the law, if your Honor please, and will finally be declared to be the law by this court," as indeed it was later by Justice Story himself.²

Such a passage at arms between court and counsel

¹"Memoir of Theophilus Parsons," 214.

²Payne, "Reminiscences of the Rhode Island Bar," 241.

as took place in either of these instances could now hardly occur.

Out of court there is no longer this distance between judge and lawyer. While they will not talk over an unfinished case, one that is finally disposed of is often the subject of free comment by each. They are now entirely upon the same level in the community. Officialism is put off when the court room is closed.

Socially they meet in the same circles and on the same footing. It is considered not improper for a judge to accept the hospitality of a lawyer concerned in a case before him, and even a case on trial. The American rule in this respect is much less strict than the English.¹

¹ See "Memoir of Chief Justice Parsons," 208-211.

CHAPTER XXIV

THE LAW'S DELAYS

THE right to be heard before judgment, the right to have judgment rendered only on due process of law, and the right in most cases to a jury trial, necessarily make the course of justice slower in this country than it need be in one where there are no such guaranties in favor of those against whom the aid of a court is invoked. The plaintiff, too, has corresponding rights. It was found not so easy by Frederick the Great to enforce his famous decree that every lawsuit in his dominions must be finished in a year. In a freer land no such result is possible.

The power of the judge to expedite trials is also much less in the United States than in most countries. They must be had mainly on oral testimony. The testimony must be so given that thirteen different men may each understand it. What the witnesses may be allowed to tell, and what they cannot be, depends on the application of numerous and artificial rules of evidence. If there is a question as to whether this rule or that applies, the judges sometimes invite and generally allow a discussion by counsel. Appeals are liberally conceded. If exceptions to any ruling of the court are to be made the basis of proceedings in error, they must be carefully noted at the time, and afterwards made the subject of a lengthy set of papers.

Many trial judges are young men of little experience either on the bench or at the bar. They are learning the law by administering it. Such men cannot decide controverted points in a moment, and shut off all unnecessary discussion in the manner that might be expected and tolerated from judges of the first rank. It is hardly probable that they will always come to the right decision at last. Hence it is that so great a liberty of appeal is granted in every American State.

Appeal means delay.¹ A man is fortunate whose appeal is heard within three months and decided within six. Oftener he must expect to wait a year or two. During a long course of years an appeal to the Supreme Court of the United States could not be reached for argument in regular order in less than three years after it was taken. In Nebraska, for some time prior to 1901 the Supreme Court was so overwhelmed with business that it could not hear a cause until five years after it was docketed.

In 1882 a brakeman was injured on a New York railroad. He brought suit against the company, and in 1884 recovered \$4,000 damages. The judgment in 1886 was reversed on appeal. On a new trial he got a verdict for \$4,900. This was appealed to two courts successively. The first affirmed and the second reversed the judgment. In 1889, there was a third trial, at which the company won. Two appeals by the brakeman followed. On the first the intermediate appellate court, in 1894, decided against him. On the second, in 1897, the court of last resort decided for him. For the

¹ See Chap. XIX.

fourth time the case came on in the trial court, and a verdict for \$4,500 was recovered. The company appealed and with success. A fifth trial gave him a verdict for \$4,900. This, too, was set aside on appeal. A sixth trial followed with exactly the same results. In 1902, the seventh and final trial took place. The verdict this time was for \$4,500. The company appealed again, but was defeated.¹ A lawsuit that embraces seven appeals and lasts for twenty years is, of course, a rarity, but the system of administrative justice under which such things are possible is faulty somewhere. The right of trial by jury is one cause of such delays. The broad right of appeal is another. The want of skill and experience on the part of trial judges and trial lawyers may be a third. The twenty-three English judges of the High Court of Justice (with the aid of masters in chancery and referees) actually try and determine about fifty-six hundred cases a year.² Each judge, therefore, on the average, dispatches over two hundred and forty. No American judges under our American system of practice could do as much and do it well. We tolerate a succession of motions and objections and arguments from the bar which English courts would not. We often take more time in impanelling a jury than they would in trying the case.

The American bar, unlike the English, is not so constituted that a certain number of its members are professedly devoted in a special way to the trial of

¹ Case and Comment, X, 50.

² This was the average number for each of the years 1900 and 1901.

cases. The English barrister in active practice may almost be said to do nothing else. His standing and his income depend on his ability to try case after case in rapid succession. Others are responsible for their slow and careful preparation. He is responsible for their quick and effective dispatch when the preparation is ended. He becomes necessarily familiar with the *technique* of a trial at every point. In examining a witness, he strikes directly at what is material, and would be ashamed to appear ignorant of what that is. In argument he stops when he is through. The ordinary American lawyer who tries a case to-day, draws papers constituting a partnership or a corporation the next, and prepares an opinion on the construction of a will the day after, has not that concentration of knowledge which comes from concentration of occupation.

The art of making a clear and definite statement of the points in controversy on paper is also one not sufficiently cultivated by the American bar. Without it the system of "code pleading," which has in most States supplanted the rigid and often meaningless forms of the common law, leads to confusion and obscurity. The claims of each party ought to be, but seldom are, so presented that matters of law are, so far as possible, kept distinct from matters of fact, and what he means to prove is set forth, but not the evidence by which he hopes to establish it. This looseness of pleading leads to endless motions to expunge this and correct that, and time of the court is taken up by the preliminaries of trials which, if the lawyers used more care or had more skill, would be devoted to

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the trials themselves. Still worse is it when such motions are postponed until the case comes on for final hearing, and witnesses and juries are compelled to wait during tedious arguments over questions of mere form.

In our great centers of population business under these circumstances almost necessarily accumulates too fast for the courts to handle it.

In bringing on criminal trials there is little delay, unless at the request of the accused, and for what seems good reason. Our Constitutions generally provide that whoever is to be tried on a criminal charge shall be tried promptly, and the practice of the courts conforms to this rule. The broad right of appeal, however, for errors of law on the part of the court may serve to postpone the execution of a sentence, and too many new trials are granted by the courts for steps in procedure in matters of a purely technical character. Delays from this cause are, however, comparatively infrequent. Most convicts are too poor to take advantage of it. Most also know that their sentence is just, and are anxious only to have it executed and through with as soon as possible. In hardly one case in a hundred is an appeal taken or, if taken, pursued to the end.¹

In our largest cities the disposition of criminal business occupies the time of several judges, and the prosecuting officer has a staff of professional assistants. In cases of such importance as to call for his personal management a postponement is occasionally inevitable. In Chicago, in December, 1903, over a thousand cases were awaiting trial in the Criminal Court.

It tends to expedition in the trial of any cause if

¹ See Chap. xvii.

it is heard before a judge especially familiar with the class of questions which it involves. Criminal courts, particularly in cities, are largely held by judges whose work is either wholly or mainly confined to them. This helps greatly to prevent delays in such tribunals. For a similar cause admiralty business is dispatched with great rapidity by the District Judges at our principal ports, and patent causes by the Circuit Courts.

In the criminal courts of New York City in 1903, there were about 3,000 prosecutions on which indictments were found, and the defendant committed for want of bail. In most of these cases there was a plea of guilty, but counting them with the others, the average time as to all which elapsed between the original arrest and the final judgment was only eight days. During the same time those who gave bail were generally tried within three months from their arrest.¹

An insufficiency of judges was formerly one great cause of delay, but the modern tendency has been to have too many, rather than too few. In the Court of Chancery in Virginia (which was held by a single Chancellor, then a man seventy-six years old) there were in 1802, 2,627 causes pending at one term.

In the city of New York a jury trial in civil causes cannot ordinarily be reached until two years after they are brought. In its principal trial court between four and five thousand cases are annually disposed of, and in 1903, there were nearly ten thousand on its docket. When the criminal courts in the borough of Manhattan—the greatest division of the city—were opened in October of that year, there were nearly five hundred

¹ Nathan A. Smyth in the *Harvard Law Review* for March, 1904.

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different prosecutions to be disposed of, and a hundred and sixty-seven prisoners awaiting trial who had been unable to procure bail.

In the county containing the city of Chicago (and which contains little else), there were in 1903 twenty thousand civil cases on the dockets of the courts. This mass of business it would require more than two years and a half to dispose of with the number of judges then provided, were no new suits instituted to divide their attention.

A very large part of the cases tried to the jury are claims for damages for accidental injuries received by employees in the course of their service. In the county in Missouri including Kansas City there were, in December, 1903, over fifty-one hundred civil causes on the dockets of the various courts. The population of the county was less than two hundred thousand. About three-fourths of the cases were against corporations for injuries received by their employees. The defendant in such an action is generally in no hurry to bring it to trial. The plaintiff often is not. He may have a weak case, brought in the hope of forcing a settlement. He has probably no money to pay his lawyer for trying it, and finds it hard to get together what is necessary to summon his witnesses and provide expert testimony as to the nature of his injuries.

Whenever it is tried, however, he is sure to want a jury, for if the case is a good one a jury is apt to give larger damages than a judge, and if a bad one a jury is less likely to appreciate its weakness.¹ A jury trial

¹ *McCloskey v. Bell's Gap R. R. Co.*, 156 Pennsylvania State Reports, 254; 27 Atlantic Reporter, 246.

is much slower than a trial before a judge, although the decision is apt to come more quickly. It also facilitates appeals by necessarily presenting more occasions for error. A judge in trying a cause, if evidence of doubtful competency is offered, can admit it provisionally and exclude it afterwards if, on deliberation, he thinks that it should not be considered. With a jury this is impossible. There must be an immediate ruling one way or the other. In the charge to a jury, also, opportunities are offered for exceptions which do not exist if the cause is to be decided by the judge alone. He does not have to instruct himself in public. He can study the case in private at his leisure.

A cause of delay formerly existed in several States which arose from the method of computing the costs taxable against the losing party. They included, by statute, a certain sum, say twenty-five or thirty-three cents a day for each day's attendance at court by the prevailing party. This was construed to mean each day during which the action lay in court, since upon any of them it might by possibility be called up, and the client was always represented by his attorney of record, a notice to whom was a notice to him. Christian Roselius, one of the leaders of the New Orleans bar in the nineteenth century, once said that he had spent a fourth of his life in the court house waiting for his cases to be called. The lawyers, as the duty of attendance fell on them, generally considered this allowance as their perquisite. An attorney with a large docket received, therefore, a number of dollars for every day the court sat, and the longer the term lasted or the more terms to which a cause was carried over, the

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larger was his gain if his client ultimately obtained judgment, and the defendant was of financial responsibility. This system was not universally discontinued until the last quarter of the nineteenth century.

A few States, by statute or constitutional provision, set a certain time within which a decision must be rendered after the trial. California gives ninety days; Idaho (Const., Art. V., Sec. 17) thirty. A sanction for the law sometimes provided is that the judge cannot draw his salary until he has made oath that he is in no default.

CHAPTER XXV

THE ATTITUDE OF THE PEOPLE TOWARD THE JUDICIARY

AMERICANS are proud of their country and of their State. They are proud of their scheme of government, by which an imperial world-power has been created for certain national and international purposes, resting on a collection of States, each of which is an independent sovereignty, absolutely as respects the others, and for the most part as respects the United States. They are in the mass an educated and intelligent people. The public schools have thus far been found adequate to Americanizing the children of foreign immigrants. The colored population of the South stands largely by itself, and constitutes no active and self-moving force in matters of political concern. An educated and intelligent people living under a government of written law of their own making cannot but know how vital it is that this law should be fully guarded and fairly administered. Americans have become distrustful of their legislatures. They believe that much of their work is ill-considered, and that some of it has its source in corruption. They are far removed from the chief executive magistrates, and from the sphere in which they move. The President comes nearer to them than the Governor of their State because he stands for more, and personifies their country, but it is not from him that they look for

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peace and safety in the ordinary affairs of life and home. They look for these to the courts, and they know that they will seldom look in vain.

Only an educated and intelligent people can live under a written Constitution. It requires of those whom it governs a certain spirit of conservatism, a certain sentiment of reverence for ancient institutions. Our Constitutions are mainly the work of former generations. We may amend or recast them, but the substantial framework will remain the same. Our Declarations of Rights speak the language and the lessons of the eighteenth century. Their provisions are almost wholly aimed at our executives and legislators. They give guarantees which the judiciary only can enforce. No people can steadily prosper unless a just mean be preserved between reform and conservatism in the administration of the government. The courts stand for conservatism, but by their recognition of custom as law, and their free use of logic and analogy to develop law, they also keep a door open for the entrance of reform.

The courts also come very close to the people. They are to be found in every county and almost every township. They settle the estates of the dead. They protect the living. They act largely through juries made up of the people and returning to them after a brief term of public service.

All these considerations put Americans in a friendly attitude toward the judiciary. It makes less show of authority than the policeman or the militiaman. But the people feel that it has authority and is ready to exercise it always to secure that right be done.

When a plain man who thinks that he has been wronged by another declares that he "will have the law on him," it expresses his conviction that he can get justice from the courts.

The creation of the judiciary of the United States was welcomed at the outset by all.¹ It was not until party feeling had become intense that Republicans found it difficult to look with approval on a force evidently becoming stronger every day, and that Jefferson could describe the Supreme Court as the sappers and miners who were gradually undermining the foundations of American liberty.²

Of the political questions which engaged attention over the whole country from time to time from the adoption of the Constitution to the close of the Civil War, almost all bore some relation to the institution of slavery and derived their real vitality from that connection. Slavery depended on State laws. Unless the authority of each State to allow and regulate it were preserved, its countenance would be endangered. This was largely the source of the "State Rights" cry.

Almost all the powers which the United States possessed the States had lost. For thirteen years each had been in the position of a full sovereign. Its courts had exercised jurisdiction over all kinds of actions. Now a new set of courts had risen up having over many actions an equal jurisdiction, over some a superior one.³

¹ See "Life of Peter Van Schaick," 435.

² Letter to Thomas Ritchie of Dec. 25, 1870. "Works of Thomas Jefferson," VII, 192.

³ See Chap. x.

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The case of *Chisholm v. Georgia*,¹ in 1793, and the institution of similar suits against other States of the South showed that the Supreme Court of the United States claimed authority to render a money judgment against a State, which meant that it could then issue an execution to collect it by levying on the property of the State.

In 1798, the Alien and Sedition Laws were passed, and a crime previously cognizable exclusively in the State courts was made a subject of prosecution in those of the United States if it affected an officer of the United States. A member of Congress, Matthew Lyon, of Vermont, who was sentenced in the Fall of that year to a fine of \$1,000 and four months in jail for writing of the President and Senate, that his message to Congress in 1797 was a bullying speech, which the Senate in a stupid answer had echoed with more servility than ever Geo. III. experienced from either house of parliament, served his time and paid the fine, but for the amount of the latter he was reimbursed by Congress in 1840.

The case of Jonathan Robbins² in South Carolina in 1799, showed that the Circuit Court at the request of the President could surrender an American citizen to a foreign government to be carried off and tried for murder. This and the sentence of Lyon became immediately the subject of hot discussion in Congress, and both contributed to the political revolution which put Jefferson in the seat of Adams in 1801.

The creation by the outgoing party of places for

¹ 2 Dallas' Reports, 419.

² See Chap. III.

eighteen new Circuit Judges appointed by Adams in the last month of his administration strengthened the popular feeling that the courts of the United States were too powerful. That Act was at once repealed,¹ and also the provision for the next regular term of the Supreme Court. The latter measure was taken to prevent any legal proceedings in the Supreme Court to secure its intervention in behalf of the displaced judges.

The new circuit system had been swept away, but the full bench at Washington, headed by Marshall, remained. The unsuccessful impeachment of one of them followed in 1804.²

His acquittal the next year, and that of a majority of the Supreme Court of Pennsylvania,³ who were impeached there at the same time for punishing a libel on certain proceedings before that court by a sentence of imprisonment, satisfied all that it was practically impossible to secure the removal of a judge except for the gravest cause. Judicial independence had been secured by the very struggle to defeat it. What has won in any contest finds favor with the multitude. They admire a victor. From this time on the courts both of the United States and the States grew in public esteem. When those of the former seemed to trench on the fields of State sovereignty, particularly in the South, the inroad was resented.⁴ In one Southern

¹ See Chaps. IX, XXII.

² See Chap. III.

³ McMaster, "History of the United States," III, 159.

⁴ See letters of Marshall alluding to this, in "Proceedings of the Massachusetts Historical Society," 2d Series, XIV, 325, 327, 329, 330.

State it was even opposed by force.¹ As late as 1854 the supremacy of the Supreme Court of the United States in expounding the federal Constitution was contested by the courts of a Northern State; there also in a case growing out of the system of slavery.²

Another decision by the same tribunal of a similar nature—that in the *Dred Scott* case³—greatly strengthened the confidence of the Southern people in the federal courts, and weakened that of the North.

It did much to bring on the Civil War, but the result of that struggle was to confirm the authority not only of the Supreme Court but of the Supreme Court as it was under Marshall and his original associates. In 1901, the centenary of his appointment was celebrated all over the country, North and South. Such a tribute was never paid before in any country to the memory of a judge. His services were commemorated for the very reason that led Jefferson to depreciate them—because they led to the establishment of a strong national government with a controlling judicial authority adequate to protect it within its sphere from interference or obstruction in any way by any State.

Confidence in the State courts has also been strengthened during the last century. It was greatly shaken at the time of the fall of the Federalists. They had lost the executive and legislative power, but they retained the judicial, and the Republicans found it hard to tolerate courts that represented the political ideas of a former generation. This continued long

¹ See Chap. x.

² *Ableman v. Booth*, 21 Howard's Reports, 506.

³ *Dred Scott v. Sandford*, 19 Howard's Reports, 393.

after the extinction of the Federalist party, and often extended to distrust of judges elected by the Republicans who were thought to have become affected by the influence of their senior associates.

In the New York constitutional convention of 1821, Peter R. Livingston appealed to the lawyers present to say "whether it has not been the case that when a man in the country of any political standing has had a suit depending at a circuit court, he has not consulted with his counsel to know what judge was to preside at the circuit; and whether he has not been frequently told that a political judge was to preside and it would not do to let the cause come on."¹ Who, he asked, were the present judges of their Supreme Court? "Judge Spencer came into office under a republican administration; Judge Van Ness was appointed by a mongrel council; and the elevation to the bench of Judge Platt was occasioned by the defection from the Republican ranks of a man elected to the Senate from the county of Dutchess, who acted the part of a political Judas, and sold his party. We have been bought and sold—there is not one of these men who would have been on the bench if our administration had been truly republican. . . . There is not a man in this Convention who is a republican of any standing or character who would like to have his liberty or property placed in the hands of a political judge of a different party."²

¹ Reports of the Proceedings and Debates of the Convention of 1821, 618.

² Reports of the Proceedings and Debates of the Convention of 1821, 620.

The judiciary may also have suffered somewhat in the esteem of dispassionate observers on account of its attitude in many of the States toward the financial enterprises in corporate form, in which so much money was made and lost in the first third of the nineteenth century. In commenting on a judicial opinion in a Southern bank case, the author of one of our leading American legal treatises, himself once a judge, has referred to this period in these plain words:

Decisions of this kind, which were not infrequent in the era of State banks of issue, can only be "reconciled" with modern holdings in view of the well-known fact that nearly all the politicians were creditors of those political banks, by notes often renewed, at the time when they finally suspended, and that all the judges were politicians. It can hardly be doubted that in many of those semi-barbarous decisions the judges were either rendering decisions to exonerate themselves from their liabilities to the insolvent banks or to exonerate powerful and influential politicians upon whom they depended for the tenure of their offices.¹

It is quite probable that an insensible bias in favor of friends and neighbors may have had its share in producing the judgments to which reference was thus made, but quite improbable that they were the fruit of baser motives. Independently of other considerations, every judge is watched by sharp eyes in every step which he may take in the progress of a cause. He acts in view of the bar at large, and of two of their number in particular, one of whom probably will be disappointed by his decision, and solicitous to ascertain and employ every reasonable ground for overturning it.

¹ Thompson on "Private Corporations," V, p. 5306.

The Bar Association of the country have exercised a large influence during the past thirty years in maintaining public confidence in the purity of the bench.

It is extremely rare that suspicion of corruption attaches to a judge; and rarer still that it attaches justly. Jurors are occasionally found who are guilty of it, and more who, without being chargeable with so black a crime, are more interested in serving a friend than in doing justice. As a whole, however, American courts are clean-handed throughout, and the people know it.

The judiciary has been popularized in most States by constitutional provisions replacing tenure during good behavior by stated terms of years, and appointment by the Governor or legislature by election by the people.

The powers of judges have been on the whole increased. The only matter in which they have been substantially cut down is that of punishment for contempt. Serious attempts have been made to abridge their jurisdiction over injunctions, but without success. These attacks have come from those representing certain labor unions. The more thorough organization of working-men in all trades and callings during the last half century, and the development of collectivism as a working theory, have produced a class of leaders among them who regard the courts as manned by representatives of capital and controlled in the interests of capital.¹ As a judicial office can only be prop-

¹The number of the *Pennsylvania Grange News* for Sept., 1904, states this view at length.

erly filled by one who has had a legal education and as, aside from a few petty magistrates and local tribunals, practically all our judges are trained lawyers, it necessarily follows that they cannot belong to the class of working-men in the general acceptance of that term. Their education has cost money and is generally the fruit of capital. The judges of the higher courts are usually men of some means. If they were not, they could not have afforded to accept their places. But the people at large do not believe that only the poor man can be relied on to deal justly on the bench. The mass of working-men do not believe it. They do believe that courts have too much power over them in their associated relations. They are in favor of cutting off the right of issuing injunctions to suppress boycotts or "picketing" in case of strikes. But they know that it is from the legislatures and not from the courts that this must be sought.

The federal judges stand higher in public estimation than the State judges of corresponding rank. This is partly on account of the paramount authority of the government which they represent. It is partly also because there are none of them who occupy the lower grades of judicial station with a petty jurisdiction over petty controversies. It is more because of their permanence of tenure. This removes them from that field of criticism which surrounds every public officer who holds for a term limited in duration, and is always in the position of a candidate for re-appointment.

Our methods of judicial appointment are not

such as always to exclude political feeling from the bench either of the States or of the United States, but the people know that there is less of it there than in any other department of governmental action.

President Hadley of Yale University has thus expressed what is the general view of the work of the courts held by thoughtful men in the United States; and it is they who in the long run form and lead public opinion.

“On the whole, federal and State courts alike have been not only a protection, but the one really efficient protection of minority interests against oppression by the majority. . . . It has more than once happened that an impatient majority has denounced these courts as instruments of partisanship. The anti-slavery leaders, the soft money leaders, and the labor leaders have in turn taken exception to their utterances, and even ventured to impugn their motives. But I think that most intelligent men who know the history of the country will say that our courts have been the real bulwarks of American liberty; and that while Hamilton and his associates would be somewhat disappointed in the working of the machinery of legislation and administration if they could see it in its present shape, they would be filled with admiration at the work which has been accomplished by the judiciary. I believe it to be the judgment of sober-minded men that the courts have furnished the agency which has guarded us against excesses, and have saved the American republic from the necessity of repeating the successive revolutionary experiences which France

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underwent before she could attain to a stable democracy.'"¹

This confidence in and respect for the judiciary as a whole has increased with the general advance of the country in population and wealth. There have been larger questions with which to deal, and the courts have been found adequate to the task. But at the same time the personal consequence and reputation of every individual American judge has been steadily decreasing. As States multiply and the range of litigation widens, the work of judicial exposition of legal principles comes to be shared by so many hands that what any one man does is of comparatively small account. There is no room for star players upon the stage. Broad as it is, it is too crowded for one to make a conspicuous place for himself and stand as Marshall or Story, Kent or Parsons, did, apart from his fellows. Popular confidence is now not placed in courts because this or that man is the ruling spirit in them. It is impersonal and attaches itself to the institution of the judiciary as, all things considered, the best guaranty of good government in the United States.

This spirit of confidence is, of course, not universal and unqualified. It is often not found in bodies of working men, associated as Labor Unions. They have repeatedly found a court enforcing public order in a way that interfered with their manner of conducting a strike. They have been met by injunctions, and more often by criminal prosecutions. The membership of a Labor Union, in many parts of the country, is apt to be largely of foreign birth. The leaders not infre-

¹ "Freedom and Responsibility," 23, 24.

quently know little of the English language and less of American institutions. They have been led, in their native land, to regard the law and its officers as their enemies, and they look at them in the same way here. It is believed, however, that a large majority of the Unions regard them with respect, and it is certain that such is the prevailing feeling of non-union men.

But that the public trust in our judges is less than it was when the first edition of this work was published,² is indicated by the favor with which, in many quarters, the doctrine of the "judicial recall" has been received. The dangers incident to its practice are obvious, and seem far to outweigh any attending advantages.

In the United States, of all lands on the face of the earth, it is important that the judges should act with resolution and without thought of the consequences personal to themselves. Elsewhere in form, but here only in fact, are judges armed with the power of declaring legislative action void which is in conflict with a higher form of law, that proceeded directly from the people, and mainly from the people of a former generation. To expose one who exercises this power to immediate displacement, by a popular vote—largely, perhaps, composed of his political opponents—is to invite the enactment of questionable statutes, and still worse—to weaken the attractions of the bench for able and honest men. Our judicial terms, in most of the States, are already too brief for the public good. To make them determinable at the will of the electoral constituency tends powerfully to keep good lawyers at the bar, who might otherwise have done honor to a judicial station.

² See *supra*, page 340.

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